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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JACK WEIT, JAMES B. COX and ROBERT W. McLALLEN, on behalf of themselves and all others similarly situated,

Petitioners,

v.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, HARRIS TRUST AND SAVINGS BANK, PULLMAN BANK AND TRUST COMPANY, CENTRAL NATIONAL BANK IN CHICAGO AND AMERICAN NATIONAL BANK & TRUST COMPANY OF CHICAGO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

In *Interstate Circuit* v. *United States*, 306 U.S. 208 (1939), this Court established that uniform, parallel pricing behavior is crucial circumstantial evidence of a price-fixing conspiracy. *Interstate Circuit* recognized that when parallel behavior of competitors pertains to price, it is in the self-interest of the participants to maintain uniformity. Accordingly, parallel price uniformity logically supports an inference of conspiracy.

On the other hand, when parallel refusals-to-deal have been scrutinized in subsequent cases, their value as circumstantial evidence has been given less weight. *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253 (1968). This is because a refusal-to-deal is contrary to the self-interest of the participants, and an inference of conspiracy does not necessarily follow. Any such inference will fall in the face of evidence of reasonable business justification.

This case presents a disturbing "cross-over" in doctrine in which the neutralization of parallel action evidence by "reasonable" business explanations, a rule evolved in the refusal-to-deal cases, has been applied to a case of uniform pricing, virtually eliminating the teachings of *Interstate Circuit* and in direct conflict with *Ambook Enterprises* v. *Time Inc.*, 612 F.2d 604 (2nd Cir. 1979), *cert. dismissed*, 101 S.Ct. 35 (1980).

Beyond this serious distortion of the Sherman Act, the other rulings of the divided Court of Appeals vitiate the role of circumstantial evidence in conspiracy cases generally and improperly inject into the pretrial process a rule of trial practice designed only to eliminate the prejudicial impact of evidence on a sitting jury. The affirmance of summary judgment in this class action price-fixing conspiracy

case thus presents four questions that impact the future role of jury trials in antitrust litigation:

1. Whether the court below formulated a novel and illegitimate standard for reviewing summary judgments in antitrust litigation by relying upon *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253 (1968), a refusal-to-deal case, and by disregarding evidence of 14 years of price uniformity in a price-fixing conspiracy case, in direct contradiction of *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208 (1939) and in direct conflict with *Ambook Enterprises, Inc.* v. *Time Inc.*, 612 F.2d 604 (2d Cir. 1979) *cert. dismissed* 101 S.Ct. 35 (1980).

2. Whether the court below improperly invoked a trial rule designed to exclude relevant, yet prejudicial evidence in the course of a jury trial, Rule 403 of the Federal Rules of Evidence, to exclude highly probative evidence of joint lobbying from consideration in opposition to summary judgment motions filed under a rule of pre-trial procedure, Rule 56 of the Federal Rules of Civil Procedure.

3. Whether the court below improperly relied upon a long-discredited circuit court rule for criminal cases in deciding that plaintiffs could not successfully resist defendants' summary judgment motions unless their circumstantial evidence of a price-fixing conspiracy excluded every rational inference other than guilt, thereby disregarding the standard set in *Holland* v. *United States*, 348 U.S. 121 (1954).

4. Whether the court below violated fundamental legal principles long established by this Court, including *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 474 (1962) and *United States* v. *Diebold, Inc.*, 369 U.S. 654 (1962), and deprived plaintiff class members of their basic constitutional right to a jury trial.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 641 F.2d 457 (1981) (Fairchild, Chief Judge, dissenting). (Appendix A.) The relevant opinions of the United States District Court for the Northern District of Illinois, Eastern Division, are reported at 467 F.Supp. 197 (1978) (Appendix B.) and 478 F.Supp. 285 (1979). (Appendix C.)

JURISDICTION

The judgment of the Court of Appeals was entered on February 11, 1981. The decision of the Court of Appeals denying plaintiffs' timely petition for rehearing with suggestion for rehearing *en banc* was entered on April 13, 1981 and is unreported. (Appendix A-54.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

STATUTES AND RULES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1; Section 4 of the Clayton Act, 15 U.S.C. § 15; Rule 403 of the Federal Rules of Evidence and Rule 56 of the Federal Rules of Civil Procedure are set forth in Appendix F hereto.

STATEMENT OF THE CASE

A. General Background

The named plaintiffs in this class action antitrust suit were holders of Mastercharge bank credit cards. They filed this case in August, 1970, alleging violations of Section 1 of the Sherman Act, 15 U.S.C. Sec. 1. Jurisdiction was predicated on 15 U.S.C. § 15 and 28 U.S.C. § 1337. The complaint, as amended, alleged that the defendant competitor banks conspired to issue their bank credit cards at a uniform and artificially fixed interest rate. Plaintiffs also alleged that the defendants used a manipulative interchange organization, the Midwest Bank Card System, Inc. ("Midwest"), and then, the Interbank Card Association, Inc. ("Interbank") to further prevent an outbreak of competition in bank credit cards, particularly in the area of interest rates.

The plaintiffs are members of the class of card holders issued cards by the defendant banks who had a balance in

their accounts during the month of August, 1970. Following class certification under Rule 23 of the Federal Rules of Civil Procedure, extensive discovery identified over 350,000 class members. Plaintiffs individually notified class members by first class mail in October, 1977.

B. Summary of Facts

The factual background of this case is not disputed and is fully described in the majority and minority opinions below. *See* Appendix A-5 through A-11 and A-30 through A-41.

In summary, the plaintiffs' evidence shows (a) uniformity of price for bank card credit extended by the defendants in an oligopolistic market for a period exceeding 14 years (Appendix A-31, A-40.); (b) discussion of the interest rate to be charged by the defendants prior to the formation of their jointly controlled organization (Appendix A-34-35.); (c) detailed agreement by the defendants to restrict almost all differences in their credit card operations (Appendix A-38.); (d) joint lobbying activity by the defendants to support their uniform rate (Appendix A-10, A-39.); and (e) numerous opportunities over a period of years for rate discussions between the defendants. (Appendix A-32.) Plaintiffs also submitted the uncontroverted affidavit of an economic expert which stated that "conscious cooperation" among the defendants was the likely cause of the long-term uniform pricing. (Appendix A-9.)

The defendants' only evidence is represented by legal conclusions in sworn statements denying that they ever combined or conspired to fix the price of bank card credit. In support of these conclusions, the defendants each swore that they had arrived at the uniform rate independently.

C. Proceedings in the District Court

Since August, 1970, plaintiffs have successfully resisted numerous procedural and substantive attacks mounted by the defendants, as illustrated by the following significant events:

October 29, 1970: The defendants moved for summary judgment on the issue of standing. The defendants withdrew their motions for summary judgment on June 9, 1971.

January 29, 1974: Defendant American moved for summary judgment. On June 10, 1974, Judge McMillen denied that motion, finding (Appendix D attached hereto, at D-2):

> "This case at bar is distinguished from *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253 (1968) where plaintiff was left with nothing more than evidence of conscious parallelism, and defendant rebutted the inferences from this circumstantial evidence with a logical and persuasive defense. Furthermore, the *Cities Service* decision is almost *sui generis*, and we find and conclude that *the inferences in the case at bar are for the jury.*" (Emphasis supplied.)

March 24, 1976: Defendant Pullman moved for summary judgment. On July 14, 1976, Judge McMillen granted the motion of defendant Pullman for summary judgment on Counts V and VI of the Third Amended Complaint and denied it with respect to Counts I through IV. Judge McMillen held (Appendix E attached hereto, at E-2):

> "On the merits, we find that genuine issues of material fact exist on Counts I through IV of the Third Amended Complaint. *Although the defendant's affidavit categorically denies any acts which would give rise to liability against it* on these counts, *the record is replete with evidence of meetings and communications between this defendant and the other defendants during the defendants' credit card operation.* See, for example, plaintiff's Exhibits 6, 8, 71, 73, 78, 107, 111, 149 and 166,

Perkins Deposition, p. 30, Miller Deposition pp. 94-5, Martindale Deposition, p. 87." (Emphasis supplied.)

Following these two court decisions holding that genuine issues of material fact existed, the defendant banks again moved for summary judgment before a different district judge, Judge Leighton, to whom the case had been reassigned. They finally succeeded. In two separate opinions, Judge Leighton entered summary judgment for all defendants and dismissed the case. (Appendices B & C.)

D. Proceedings in the Circuit Court of Appeals

On February 11, 1981, the Seventh Circuit affirmed the entry of summary judgment for the defendants by a 2-1 panel vote, with Chief Judge Fairchild dissenting. On April 13, 1981, plaintiffs' petition for rehearing with suggestion of rehearing *en banc* was denied. (Appendix A-54.)

REASONS FOR GRANTING THE WRIT

This case raises important substantive and procedural issues which, if allowed to stand, would constitute a significant erosion of the constitutional right to trial by jury in price-fixing conspiracy cases. The majority and district court opinions below ignored the critical significance of uniform pricing evidence in a price-fixing case, contrary to *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208 (1939) and in conflict with *Am Book Enterprises, Inc.* v. *Time Inc.*, 612 F.2d 604 (2d Cir. 1979), *cert. dismissed*, 101 S.Ct. 35 (1980), by resorting to a misguided application of *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253 (1968), a refusal-to-deal case. Such nullification of the most important evidence in a price-fixing case menaces both civil and criminal antitrust enforcement.

Other significant errors committed in this case compound the potential threat to jury trials in complex

cases. The Court of Appeals, for example, improperly seized upon Rule 403 of the Federal Rules of Evidence to exclude concededly relevant evidence from its consideration on the basis of anticipated jury prejudice at trial. This Court has never sanctioned such a maneuver. The divided Court of Appeals not only condoned the trial court's errors, but it contributed an additional error by resurrecting an unsound circuit court opinion dealing with the role of circumstantial evidence in criminal jury instructions. The opinion relied on was not even cited by the defendants in this action and has not been the law since it was discredited by this Court in 1954 in *Holland* v. *United States*, 348 U.S. 121. Finally, contrary to the previous admonitions of this Court in *Poller* v. *Columbia Broadcasting System*, 368 U.S. 474 (1962) and *United States* v. *Diebold, Inc.*, 369 U.S. 654 (1962) and in conflict with the decisions of all the circuit courts of appeal, the courts below failed to consider all of the evidence offered in opposition to the summary judgment motions and failed to draw inferences from the evidence in a light most favorable to plaintiffs. If left intact, these errors portend significant problems for the future administration of federal pretrial procedure.

To overturn and correct these serious errors perpetrated in the proceedings below, and to obtain the jury trial to which they are entitled, petitioners now seek the aid of this Court.

I. The Decision Below, in Formulating a Novel and Illegitimate Standard for Reviewing Summary Judgments in Price-fixing Conspiracy Cases that Eliminates the Probative Effect of Uniform Pricing, is in Direct Conflict with a Controlling Decision of this Court and with Decisions of Other Circuit Courts of Appeal.

In formulating its antitrust analysis in this price-fixing case, the Court below misapplied *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253 (1968), a

refusal-to-deal case. As a result, the court transformed the *Cities Service* decision into a rigid rule of antitrust law which effectively overrules *Interstate Circuit* v. *United States*, 306 U.S. 208 (1939). It is therefore necessary for this Court to set forth again the doctrine to be applied in antitrust cases involving parallel price behavior in the context of summary judgment motions.

The novel and illegitimate doctrine applied in this case originated in the District Court. The court held that the probative value of the defendants' parallel pricing behavior was eliminated by the defendants' conclusory sworn denials, and that "the burden then shifts to the plaintiffs to come forward with significant probative evidence tending to support the complaint, *to show that the rate set was counter to defendants' interest and accompanied by a motive to enter into an agreement* [or] to demonstrate a 'plus factor'." 467 F.Supp. at 211 (App. B-31, 32). (Emphasis supplied.) Judge Leighton concluded:

> "The showing of *parallel behavior* under these circumstances, where each bank faced identical problems of fraud, credit losses and large initial expense to which reasonable businessmen would react in the same fashion, *does not provide a basis for the inference of the conspiracy which plaintiffs allege.*" 467 F.Supp. at 210-211 (App. B-31). (Emphasis supplied.)

The majority of the Court of Appeals sanctioned this analysis.* 641 F.2d at 462 (App. A-13).

This disregard of price uniformity in a price-fixing conspiracy case not only destroys the very essence of such a case when it is based primarily upon circumstantial evi-

* The courts below thus required of plaintiffs a logical impossibility: proof that a price-fix is contrary to the economic interests of the price-fixers.

dence, but it also was clearly reversible error in light of *Interstate Circuit.*

In *Interstate Circuit,* the collective pricing action of the defendants was held to be sufficient circumstantial evidence of conspiracy: "Each was aware that all were in active competition and that without substantially unanimous action with respect to the restrictions for any given territory there was risk of a substantial loss of the business and good will of the subsequent-run and independent exhibitors, but that with it there was the prospect of increased profits. *There was, therefore, strong motive for concerted action . . . .*" 306 U.S. at 222. (Emphasis supplied.)

Although the Court mentioned that it was open to the defendants in such a case to present evidence that their actions actually arose from independent motives, there is no hint that such evidence would be anything but contrary evidence to be weighed by a jury. The inferences from uniform action in a price fixing case remain available to the plaintiff and, like other circumstantial evidence, should be weighed by the jury together with all the other evidence in the case.

In *Cities Service,* this Court observed that evidence of the defendants' parallel refusal to deal with plaintiff did not by itself support an inference of conspiracy. Manifestly, this Court was not attempting to fashion a rigid rule for all antitrust cases, whereby conclusory affidavits asserting independent business reasons automatically nullify circumstantial evidence of parallel business behavior. To the contrary, this Court carefully distinguished *Interstate Circuit:*

> "The reason that the absence of direct evidence of agreement in *Interstate Circuit* was not fatal is that the distributors all had the same motive to enter into a tacit agreement." 391 U.S. at 287.

Contrasting the refusal to deal situation under consideration in *Cities Service*, this Court stated:

> "Here Waldron is unable to point to any benefits to be obtained by Cities from refusing to deal with him and, therefore, the inference of conspiracy sought to be drawn from Cities' 'parallel refusal to deal' does not logically follow." *Id.*

This Court, therefore, explicity recognized that evidence of uniform pricing is clearer and more probative evidence of a conspiracy than is evidence of parallel refusals-to-deal, for good reason.

Proof of an antitrust conspiracy, like any conspiracy, often depends on circumstantial evidence. Some circumstantial evidence of conspiracy is inherently stronger than other circumstantial evidence. If a number of suppliers refuse to deal with a potential customer, each may have good reasons for not doing so. When these reasons are placed on the record, it may be difficult, without more, to infer a conspiracy from the refusals-to-deal. This commonsense evaluation of one limited type of circumstantial evidence in refusal-to-deal cases is the rationale of *Cities Service* and other cases relied on below such as *Modern Home Institute, Inc.* v. *Hartford Accident & Indemnity Co.*, 513 F.2d 102 (2d Cir. 1975). *See, Weit,* 641 F.2d at 462, 464 (App. A-13, 18); 478 F.Supp. at 294 (App. C-22); 467 F.Supp. at 208, 209 (App. B-26, 27).

Circumstantial evidence of uniform pricing by oligopolists stands on a different footing. Such evidence can support an inference of antitrust conspiracy because (1) the adherence of all parties is necessary for maintenance of the price, and (2) the arrangement, by keeping profits higher than would otherwise prevail, is *in the economic self-interest* of the parties. *Interstate Circuit, Inc.* v. *United*

States, 306 U.S. 208 (1939). Sworn denials of an agreement do not destroy the logic of this rightful inference.*

These principles were applied recently by the Court of Appeals for the Second Circuit in *Ambook Enterprises* v. *Time Inc.,* 612 F.2d 604 (2nd Cir. 1979), *cert. dismissed,* 101 S.Ct. 35 (1980). *Ambook* stands in stark contrast to the opinions of the courts below in this case. The plaintiff there, who advertised in newspapers and magazines, complained of the uniform pricing policy of certain publications which allowed a 15% discount only when advertising was placed through an advertising agency. As in the case at bar, the defendants submitted evidence denying the existence of a conspiracy and the district court granted summary judgment. The court of appeals for the Second Circuit reversed, holding, in direct conflict with the opinion in this case, that the fact that "agency 'commissions' remain a uniform 15%" was sufficient evidence to support the complaint against a motion for summary judgment. 612 F.2d at 613.**

The court in *Ambook* relied upon *Interstate Circuit* as "the leading case for the proposition that an agreement can be inferred from commonality of the conduct." *Id.* Pointing

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* If such sworn denials are allowed to stand as an absolute bar to price-fixing cases based on circumstantial evidence, including parallel pricing, the only price-fixing cases which will survive are those based upon direct evidence or sworn admissions. As Chief Judge Fairchild noted, "[n]o conspirator today is going to publicly agree to joint action, nor are they going to leave a written record of their agreement." 641 F.2d at 479 (App. A-51).

** It should be noted that *Ambook* was a 2-1 decision, with the majority reaching the same legal conclusions and based primarily upon the same legal reasoning as found in the dissent in this case. Conversely, the dissent in *Ambook* is very similar in reasoning to the majority in this case.

out that *Interstate Circuit* found adequate evidence of a conspiracy despite a lack of evidence of express agreement, the court noted: "In the instant case, a conspiracy among the media could be similarly inferred." 612 F.2d at 614. The court stressed the fact that the uniform pricing clearly redounded to the economic benefit of the conspirators. "The 15% system also benefited the agencies by the peace and quiet of a uniform pricing policy. . . . These advantages depended, as in *Interstate Circuit*, upon substantially uniform acceptance." 612 F.2d at 616. Stressing the strength of the inferences which can be drawn in a uniform pricing situation, as compared with a refusal to deal case, the court stated, "In the *Cities Service* case, the court indicated that one factor to consider in determining if agreement should be inferred from parallel conduct was whether agreement benefited the alleged conspirators as the practice in *Interstate Circuit* clearly had." 612 F.2d at 616.

In addition to *Ambook*, there are many authorities which hold that in the uniform pricing situation, conscious parallelism can be strong circumstantial evidence of conspiracy.*

As the issue was framed by the court in *Reading Industries, Inc.* v. *Kennecott Copper Co.*, 477 F.Supp. 1150 (S.D.N.Y. 1979), *aff'd on other grounds*, 631 F.2d 10 (2d Cir. 1980), *cert. denied*, 49 U.S.L.W. 3911 (1981):

> *"[T]he question is not whether the defendants had legitimate reasons for their action, but whether they acted*

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* *See, Cackling Acres, Inc.* v. *Olson Farms, Inc.*, 541 F.2d 242 (10th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977); *Morrison* v. *Nissan Motor Co.*, 601 F.2d 139 (4th Cir. 1979); *Wall Products Company* v. *National Gypsum Co.*, 326 F.Supp. 295 (N.D. Cal. 1971); *C-O-Two Fire Equipment Co.* v. *United States*, 197 F.2d 489 (9th Cir. 1952), *cert. denied*, 344 U.S. 892 (1952); *Bray* v. *Safeway Stores, Inc.*, 392 F.Supp. 851 (N.D. Cal. 1975).

> *in concert,* and here the legitimate business reasons which the defendants suggest motivated their actions do not defeat the possibility that the defendants acted collusively. . . . That each of the defendants had independent motives for holding the price of copper down does not negate the possibility that they acted together to effect them." 477 F.Supp. at 1156-1157. (Emphasis supplied.)

Chief Judge Fairchild's dissent recognized this fundamental precept, but the majority of the panel, which sanctioned the analysis of the lower court, did not. In response to plaintiffs' economic arguments and their urging that the inference to be drawn from parallel pricing is stronger than the inference to be drawn from parallel refusals-to-deal, the court merely stated that both price-fixing and boycotts are *per se* Section 1 violations, and that "There is no basis for altering the standard for summary judgment to conform to a lesser quantum of evidence in either case." 641 F.2d at 465 (App. A-19).

The erroneous doctrine of this case is proliferating and has been relied upon for the summary disposition of other price-fixing cases. In *Tose* v. *First Pennsylvania Bank,* 1981-1 Trade Cases ¶ 63,985 (3rd Cir. 1981), where the defendants obtained summary judgment on the allegations of a price-fixing conspiracy, the court discounted the existence of price uniformity and cited the language of the majority opinion in this case that *"parallel pricing* or conduct *lacks probative significance* when the product in question is standardized or fungible . . ." (*Id.* at page 76, 124).

(Emphasis supplied.)* One of the district court opinions in this case was relied on in granting summary judgment in *In re Folding Carton Antitrust Litigation*, 1980-2 Trade Cases ¶63,460 (N.D.Ill. 1980). There, the plaintiff was required to show, in a price-fixing case, "(1) acts by defendants *in contradiction of their own economic interests and* (2) satisfactory demonstration of a *motivation to enter an agreement.*" (*Id.* at page 76, 430). (Emphasis supplied.)

This trend can only be expected to continue as hard-pressed district judges seek ways to relieve their congested dockets. The cumulative effect of such a trend condones the *per se* illegality of tampering with price, which Justice Stevens noted in *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978), is the "central nervous system of the economy," citing *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).**

The fundamental defect in the reasoning of the district judge and majority opinion below is their complete failure to recognize that this is not a refusal-to-deal case. The plaintiffs are not required to prove actions by the defendants *against* their economic self interest, because that is not an issue in a price-fixing case. The circumstantial evidence of uniform pricing, along with the mass of other evidence adduced, entitles the plaintiffs to go to the jury. Under *Interstate Circuit* and other cases, mere self-serving protestations of innocence by the defendants' officers can-

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* Such an unjustified variance from normal antitrust rules was rejected in *Beatrice Foods Co.* v. *United States*, 312 F.2d 29 (8th Cir. 1963). In an opinion authored by then Judge Blackmun, the court relied on *Interstate Circuit* (312 F.2d at 45) in affirming a criminal conviction of price-fixing that involved the "highly standardized commodity" of fluid milk. 312 F.2d at 42.

** This Court recently re-affirmed the *per se* illegality of any agreement touching upon price. *Catalano, Inc.* v. *Target Sales, Inc.* 446 U.S. 643 (1980).

not defeat plaintiffs' Seventh Amendment right to a jury trial. The danger to enforcement of the antitrust laws posed by the misapplication of *Cities Service* must be halted by this Court.

II. The Court Below, in Using Rule 403 of the Federal Rules of Evidence to Exclude Highly Probative Evidence in Opposition to Opposing Defendants' Summary Judgment Motions, has Incorrectly Decided an Important Question of Federal Law Which has not Been, but Should be Settled by This Court.

The only evidence in this case which the defendants did not attempt to explain by "reasonable" business motives was their joint lobbying for a common interest rate. This joint effort culminated in the enactment of an Illinois statute establishing the maximum lawful cardholder interest rate on revolving credit at 18% per annum. 641 F.2d at 460-461 (App. A-9, 10); 473-474 (App. A-38, 39). Prior to the statute, different interest rate *maxima* applied to the different defendants. The majority below agreed with the dissent that "an inference can be drawn that the banks would not have worked together in lobbying for passage of a bill in the legislature unless they had implicitly agreed on an interest rate as well." 641 F.2d at 466 (App. A-22). Nevertheless, the majority excluded this evidence from consideration on the Rule 56 motions, without citation to any case supporting their view, because "confusion of issues [by the jury] is the probable result of admission of this evidence." 641 F.2d at 467 (App. A-24). This novel holding flies in the face of *United Mine Workers of America* v. *Pennington*, 381 U.S. 657 (1965), and totally misapplies Federal Rule of Evidence 403, a rule of trial practice.

This Court's footnote 3 in *Pennington* is well known:

> "It would of course still be within the province of the trial judge to admit this evidence, if he deemed it probative and not unduly prejudicial, under the 'estab-

> lished judicial rule of evidence that *testimony of prior or subsequent transactions,* which for some reason are barred from forming the basis for a suit, *may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny.* [Citations omitted.]" 381 U.S. at 670-671. (Emphasis supplied.)

All members of the panel below recognized that plaintiffs do not claim an independent antitrust violation based on the joint lobbying effort. Plaintiffs argue that the evidence proves the purpose and character of defendants' uniform setting of the 18% interest rate. Similar evidence has been used elsewhere for exactly that purpose under this well-recognized exception to the *Noerr-Pennington* rule. *See, e.g., Household Goods Carriers' Bureau* v. *Terrell,* 452 F.2d 152, 161 (5th Cir. 1971); *Webb* v. *Utah Tour Brokers Association,* 568 F.2d 670 (10th Cir. 1977). The majority even concedes that an appropriate cautionary instruction could be fashioned at trial to meet defendants' *Noerr-Pennington* concerns, 641 F.2d at 467 (App. A-24), and such limiting instructions have been found reliable and effective. *See, United States* v. *Brown,* 605 F.2d 389 (8th Cir. 1979). Yet the majority in this case employed a rule designed solely to eliminate the prejudicial impact of evidence on a sitting jury in the process of deciding a pretrial motion.

This position is indefensible. Rule 403 is meant to exclude evidence at trial which tends to horrify, evoke sympathy or increase a desire to punish due to prior bad acts, and whose probative value is slight. 10 Moore's Federal Practice § 403.10[1], at IV-75 (2d Ed. 1979). Plaintiffs believe and the courts below agreed that the evidence of defendants' lobbying efforts is none of these and is clearly relevant. Given the propriety and importance of this evidence, the use of Rule 403 to exclude it from consideration in opposition to summary judgment motions was plain error.

The stated purpose of Rule 403 is to allow the trial judge, during the pendency of the trial, to balance "the probative value of and need for the evidence against the harm likely to result from its admission." Notes of Advisory Committee on Proposed Rules, Rule 403, Title 28, USCA, Rule 403. In addition, "in reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instru ion." *Id.* Thus the trial judge is given the discretion, in the context of a trial situation, as to what relevant evidence is to be excluded under the Rule.

Obviously, the trial judge in reaching this balance will and must consider the actual trial situation when the questioned evidence is introduced. The many factors bearing on such an analysis include the nature and extent of the evidence previously admitted and the sophistication of the particular jury hearing the evidence. The court could also consider the method by which the evidence was to be offered, either by obtaining a written offer of proof or by reviewing the evidence outside the presence of the jury, as well as the proposed limiting instruction under which it is offered. If the question is close in his mind, the balance is to be struck in favor of admission. *United States* v. *Dennis,* 625 F.2d 782 (8th Cir. 1980). The purpose, therefore, of Rule 403 is counter to the purpose for which it was used by the Court of Appeals. Sitting outside the trial situation and unable to determine the competency of a jury not yet selected, the majority below used a rule of trial evidence to defeat the protections of a rule of procedure.

The fallacy of the court's reasoning regarding Rule 403 is shown in the fact that it is possible, although not probable, that no jury would ever be empanelled. The plaintiffs are entitled to waive their right to a jury at any time before

trial. The implications for this use of Rule 403 are therefore obvious and frightening—future plaintiffs may be compelled to forego their right to a jury trial in a complex case in order to insure that all of their evidence will be considered.

This case presents the most extreme application of Rule 403, since the excluded evidence impeached the defendants' self-serving affidavits supporting their motions. The defendants argued that they needed the maximum interest rate allowable in order to offset expected losses at the beginning of their credit card programs and the courts below accepted that rationale. See Page 7, supra.

Totally undermining that argument, however, is one critical fact that was unheeded below: there was no generally applicable "maximum rate" in 1966. It was only achieved in Illinois in 1967 as a result of the joint lobbying effort of the defendants. 641 F.2d at 471 (App. A-32), 473-474 (App. A-38, 39).

The national banks, having given and received signals that the cardholder interest rate should uniformly be fixed at the mythic legal "maximum," obviously were concerned lest their state bank competitors undercut them as a result of their perception that the allowable state bank rate was a 7% "add-on."* By the time the banks issued their cards in the fall of 1966, after a summer of countless communications and legal doubts, they had all managed to arrive at an identical decision to charge their cardholders interest at the rate of 18%. It is remarkable that they reached precisely the same rate—with no period of competitive adjustment—when proceeding from such disparate regulatory matrices. The fact that they achieved absolute uniformity itself is convincing circumstantial evidence of price fixing.

* The District Court's insistence that plaintiffs prove that the defendants acted against their own self-interest in fixing interest rates perhaps aided its exclusion of this critical evidence.

The defendants, still uncomfortable with the fragile stability of their price uniformity, jointly hired and paid for a lobbyist through Midwest in January 1967. That lobbyist was successful in procuring legislation that enabled the state banks to charge the same interest rate as the national banks, although the banks' lobbyist thought the bill was unnecessary for the national banks. 641 F.2d at 474 (App. A-39). The early draft of the Midwest bill set the maximum cardholder interest rate at 24%, but later drafts settled on 18%. *Id.* The fact that the banks moved together from a proposed 24% rate to an 18% rate also is strong circumstantial evidence of a conspiracy.

Passage of the "clarifying" legislation reinforced the price-fixing conspiracy and allowed all of the defendant banks, both national and state, to enjoy the "peace and quiet of a uniform pricing policy." (See *Ambook*, Page 11, *supra*.) Viewed in this light, the evidence of joint lobbying is critical to an explanation of the motives and goals of the defendants. The joint lobbying efforts demonstrate the nature and character of the defendants' activity just as clearly as does the candid statement of John Perkins of Continental that the defendants should "keep a lid on any fast moves" (Plaintiffs' Exhibit 54), or the report of Continental that Pullman "has changed their package, and are now offering basically what we are proposing." 641 F.2d at 473 (App. A-37).

The court's refusal to consider the joint lobbying effort as evidence of the defendants' overall price fixing conspiracy also stands in direct contradiction to the rule in *United States* v. *Diebold, Inc.*, 369 U.S. 654 (1962). Had the court correctly undertaken to determine the admissibility of this

competent, relevant evidence on defendants' motion for summary judgment, the *Diebold* rule required such evidence to be viewed in the light most favorable to the plaintiffs. All questions posed by such balancing of evidence on a motion for summary judgment under Rule 56 therefore should have been resolved in favor of the plaintiffs. By resolving all questions of probative value and prejudicial impact of the excluded lobbying evidence *against* the plaintiffs, the court once again ignored the basic principles governing motions for summary judgment.

The reference of the majority at 641 F.2d at 467, note 38 (App. A-23), to *American Securit Co.* v. *Hamilton Glass Co.*, 254 F.2d 889 (7th Cir. 1958) does not support its decision. The issue there was the competency of affidavit and deposition testimony in *support* of a summary judgment motion. In addition, because it was unclear that the affiants would have been competent witnesses at trial, the court refused to rely on the evidence and reversed the granting of summary judgment. The evidence excluded in *American Securit* thus was excluded because its very validity was in doubt.

As plaintiffs have shown here, on the other hand, there is no question as to the competence of the excluded evidence. It is also plain that any judgment as to its admissibility must be made in light of the precise trial context when it is offered, as Rule 403 contemplates.

This Court has never instructed the federal judiciary on the place of Rule 403 of the Federal Rules of Evidence, if any, in considering summary judgment motions under Rule 56 of the Federal Rules of Procedure. The time to

do so is now so that the constitutional right to a trial by jury is never defeated by a judge's abstract guess, while reading papers in chambers, that highly probative evidence might possibly have a prejudicial effect on a nonexistent jury. The ruling of the court below on this issue alone mandates reversal.

III. The Decision Below, in Holding That Plaintiffs' Circumstantial Evidence of a Price-Fixing Conspiracy Must Exclude Every Rational Inference Other Than Guilt in Order to Defeat Defendants' Summary Judgment Motions, is in Direct Conflict With a Controlling Decision of this Court and with Decisions of Other Circuit Courts of Appeal.

The majority below attempts to justify its weighing of the evidence by reviving the long-dormant special rule for circumstantial evidence in criminal cases enunciated in *Pevely Dairy Co.* v. *United States*, 178 F.2d 363 (8th Cir. 1949): ". . . when the plaintiff or prosecution relies on circumstantial evidence alone, the inference of unlawful agreement rather than individual business judgment must be the compelling, if not exclusive, rational inference." 641 F.2d at 463 (App. A-15). If this standard were to apply to the disposition of summary judgment motions in circumstantial evidence cases, then Rule 56 is turned on its head, and it is plaintiffs' evidence which is subjected to "a critical eye" and the defendants who receive "every reasonable inference in their favor."

The test set forth in *Pevely* and similar cases, however, was laid to rest by this Court in *Holland* v. *United States*, 348 U.S. 121, 139-140 (1954). This Court held that a special jury instruction in a circumstantial evidence case, requiring

that such evidence "exclude every reasonable hypothesis other than that of guilt," was "confusing and incorrect." In words which should apply even more strongly to motions for summary judgment in a civil case than to a trial in a criminal case, this Court stated:

> "Circumstantial evidence in this respect is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more." 348 U.S. at 140.

The fact that *Holland* discredited the special rule for weighing evidence in circumstantial evidence cases is borne out in numerous subsequent decisions. For instance, the court in *United States* v. *Conti*, 339 F.2d 10, 12-13 (6th Cir. 1964) stated:

> "Appellant's contention that where the government evidence is circumstantial, it must be such as to exclude every reasonable hypothesis other than that of guilt, has considerable support in the cases decided prior to December 6, 1954. But, in *Holland* v. *United States* . . . the Supreme Court stated that the better rule was that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence was confusing and incorrect. Accordingly, this Court has ruled since that date that it is not necessary that circumstantial evidence be such as would remove every reasonable hypothesis except that of guilt."

Similarly, in *United States* v. *Burkeen*, 350 F.2d 261 (6th Cir. 1965), where the defendant had urged the old circumstantial evidence rule, the court replied, "This is not the law." 350 F.2d at 264. The decisions of the Seventh Circuit are in accord. *United States* v. *Page*, 580 F.2d 916, 919 (7th Cir. 1978); *United States* v. *Finis P. Ernest, Inc.*, 509 F.2d 1256, 1261 (7th Cir. 1975).

The Eighth Circuit itself, out of which *Pevely* arose, now correctly applies this Court's *Holland* decision. *United States* v. *Satrang*, 621 F.2d 930, 931 (8th Cir. 1980); *United States* v. *Taylor*, 599 F.2d 832, 838 (8th Cir. 1979). The other circuits concur. *See, e.g., United States* v. *Patterson*, 644 F.2d 890, 893 (1st Cir. 1981); *United States* v. *Barnes*, 604 F.2d 121, 156 (2nd Cir. 1979), *cert. denied*, 446 U.S. 907 (1980); *United States* v. *Bycer*, 593 F.2d 549, 551 (3rd Cir. 1979); *United States* v. *Houde*, 596 F.2d 696, 702 (5th Cir. 1979).

Holland and its progeny all involved criminal trials. If circumstantial evidence is sufficient to convict a criminal defendant in a jury trial, it certainly can support the denial of a summary judgment motion in a civil case, particularly in light of this Court's admonition that inferences from the evidence must be construed most favorably to the party opposing the motion. *United States* v. *Diebold, Inc.*, 369 U.S. 654 (1962). (See Pages 18-19, *supra* and 23, *infra*.)

Other than this case, not a single decision has been found that rested a summary judgment decision upon the *Pevely* treatment of circumstantial evidence. By resorting to *Pevely*, a case not even cited by the defendants, the majority resurrects a long-discredited rule that would virtually eliminate jury trials in civil antitrust conspiracy cases and hamper the use of circumstantial evidence in criminal cases. This Court, exercising its supervisory authority, must act to undo this result.

IV. The Decision Below, in Failing to Consider All of Plaintiffs' Evidence Opposing the Summary Judgment Motions and in Failing to Draw Inferences from the Evidence Most Favorably to Plaintiffs, is in Direct and Fundamental Conflict with Controlling Decisions of this Court and with Decisions of Other Circuit Courts of Appeal.

This Court long ago articulated both the governing standard to be applied in deciding motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure and the reasons for erecting such a strict procedural safeguard. In *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962), an antitrust case in which defendants ha obtained summary judgment in the trial court, this Cou reversed with the following warning:

> "We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'" 368 U.S. at 473.

In the same year, this Court reversed another summary judgment ruling in an antitrust case and announced unequivocally the proper treatment of competing inferences from the same evidence on such a motion:

> "On summary judgment the inferences to be drawn from the underlying facts contained in [the affidavits, attached exhibits and depositions submitted below] must be viewed in the light most favorable to the party opposing the motion." *Diebold, supra,* at 655.

The Second Circuit applied the standard set forth by this Court in the price-fixing antitrust context, based upon parallel business behavior and circumstantial evidence, in

Ambook Enterprises v. *Time Inc.*, 612 F.2d 604 (2d Cir. 1979), *cert. dismissed* 101 S. Ct. 35 (1980). In the majority opinion, authored by Judge Friendly, the court held that:

> "Summary judgment for the defendant can be sustained in such a case if but only if the reviewing court is satisfied that a properly instructed jury, giving full weight to plaintiff's evidence, *drawing every reasonable inference in its favor*, and *subjecting defendants' evidence to a critical eye*, could not rationally have found that plaintiff was entitled to any relief." 612 F.2d at 611 (Emphasis supplied.)

Decisions of other courts of appeals unanimously echoing this fundamental concept of civil procedure are legion.* The Seventh Circuit itself recently demanded that a rigorous burden be met by the party moving for summary judgment in *Central National Life Insurance, Co.* v. *Fidelity and Deposit Company of Maryland*, 626 F.2d 537 (7th Cir. 1980).

Disregarding this long-standing authority, the majority in this case considered only a portion of the evidence presented by the plaintiffs and then reviewed that evidence in a light most favorable to the defendants. Such weighing of the evidence on a pretrial motion, tantamount to a trial *in camera*, once again must be condemned by this Court.

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* *See, e.g., Maiorana* v. *MacDonald*, 596 F.2d 1072, 1076 (1st Cir. 1979); *Wahl* v. *Rexnord, Inc.*, 624 F.2d 1169, 1181 (3rd Cir. 1980); *Charbonnages de France* v. *Smith*, 597 F.2d 406, 414 (4th Cir. 1979); *Kennett-Murray Corp.* v. *Bone*, 622 F.2d 887, 892 (5th Cir. 1980); *New Jersey Life Insurance Co.* v. *Getzs*, 622 F.2d 198, 200 (6th Cir. 1980); *Inland Oil & Transport Co.* v. *United States*, 600 F.2d 725, 728 (8th Cir. 1979); *Spectrum Financial Companies* v. *Marconsult, Inc.*, 608 F.2d 377, 380 (9th Cir. 1979); *Williams* v. *Borden, Inc.*, 637 F.2d 731, 738 (10th Cir. 1980); *Weisberg* v. *United States Department of Justice*, 627 F.2d 365, 368 (D.C. Cir. 1980).

A. The Decision Below Failed to Consider the Economic Evidence Presented by Plaintiffs in Opposition to the Summary Judgment Motions.

The majority decision in this case purportedly is predicated on an independent review of the record, 641 F.2d at 461, yet it is clear that the majority considered plaintiffs' opposition evidence to consist solely of parallel interest rates, "together with evidence that the opportunity to conspire existed . . . ." 641 F.2d at 463 (App. A-12). Such a view ignores the additional, and critical, economic evidence presented by the plaintiffs which is analyzed at length in the dissent.

For example, Chief Judge Fairchild concluded that:

> "Another factor contributing to the evidence from which an agreement to fix interest rates may rationally be inferred is defendants' *express agreement* to standardize everything about their charge cards other than marketing strategy and interest rates." 641 F.2d at 477 (App. A-45). (Emphasis supplied.)

As noted in the dissent, plaintiffs' expert witness testified "that these uniform requirements were no more essential to the compatability of the charge card system and the interchange of sales slips than they are to the interchange of checks." *Id.* This artificial product standardization, particularly in an oligopolistic market, is evidence highly probative of a conspiracy. *Reading Industries, Inc.* v. *Kennecott Copper Co., supra,* at 1157; II *Antitrust Law,* Areeda Turner, Section 404b1, p. 274 (1978).

The majority decision also failed to consider the evidence introduced by plaintiffs of the defendants' obvious economic motive to conspire. The record is clear that the banks feared the entry of any bank credit card at a lower rate than had been planned because they would then have been forced to market their cards at the lower rate as well. 641 F.2d at 471 (App. A-34).

This uncontradicted economic evidence—artificial product standardization and clear motive to conspire—was not even considered in the majority decision. Yet the economic evidence is critical to plaintiffs' claim and thoroughly consistent with a finding of a price-fixing conspiracy. Evidence of the economic context of the facts under analysis is particularly crucial in an antitrust case. Judge Fairchild concluded that the nature of the Chicago banking community facilitated the exchange of pricing information and that, "given the situation, defendants' conduct should be carefully scrutinized for evidence of conspiratorial behavior." 641 F.2d at 471 (App. A-32). The majority opinion, however, did not consider plaintiffs' economic evidence, and instead granted full and absolute credibility to defendants' inherently suspect explanation of their business decisions and their protestations of innocence. In fact, the economic analysis of plaintiffs' expert witness alone should have served to deny the summary judgment motions. *See, e.g., Bieghler* v. *Kleppe*, 633 F.2d 531 (9th Cir. 1980); *Continental Bank* v. *Wa-Ho Truck Brokerage*, 122 Ariz. 414, 418, 595 P.2d 206, 210 (Ct. App. 1979).

The action of an appellate court in affirming the dismissal of an antitrust case before trial, without consideration of the economic evidence involved, should not be countenanced.

B. The Decision Below Failed to Draw Inferences from the Evidence Most Favorably to Plaintiffs in Affirming the Granting of Summary Judgment to Defendants.

As indicated above, the two complementary cases which should have guided the Seventh Circuit in this case were the 1962 decisions in *Poller* v. *Columbia Broadcasting System* and *United States* v. *Diebold, Inc.*, Page 23, *supra*. In 1969 this Court again "cautioned" against the use of summary judgment in complex antitrust litigation when it reversed such a judgment in *Norfolk Monument Co.* v.

Woodlawn Memorial Gardens, Inc., 394 U.S. 700, 704 (1969). Yet the Court of Appeals in this case, like the District Court before it, construed the evidence presented by plaintiffs *against* them and in favor of the defendant banks. This effort to turn Rule 56 upside down is a pernicious precedent that must be reversed.

How far the majority below strayed from the proper summary judgment standards is illustrated by its use of the word "suggests." For example, the court found that the evidence suggested inferences for the defendants:

> "While defendants were clearly concerned about a chaotic credit card market, the record *suggests* their concerns were not anti-competitive or conspiratorial. Rather, they were legitimate business concerns." 641 F.2d at 466 (App. A-21). (Emphasis supplied.)

The majority opinion below implicity concedes that far different inferences can be drawn from the same evidence in this case. The majority opinion tellingly comments as follows on evidence relating to the defendant banks' fear of "chaos" in the Chicago credit card market:

> "The dissent mistakenly *construes* defendants' concern about 'chaos in the market' as an admission of anti-competitive motive in forming the Midwest System."
>
> ....
>
> "The evidence *suggests*, however, that by chaos the banks did not mean competition as to interest rates, but a retail market in which a vast number of charge cards existed." 641 F.2d at 465 (App. A-20, 21). (Emphasis supplied.)

It cannot be disputed that it is the role of the jury, and not the judge, to decide which version of the evidence is more credible and more persuasive. This fundamental concept was ignored by the majority below. Their opinion fails even to cite *Diebold*, this Court's leading case on drawing inferences in antitrust summary judgment cases, much less rationalize their failure to follow its mandate.

The evaluation of the evidence in the court's opinion is heavily influenced by a candidly expressed goal of judicial economy and relief of jurors. The following sentiments clearly set the tone for the majority's decision:

> "A trial of this nature places a substantial burden on jurors who are seldom prepared to analyze the complexities of antitrust claims." 641 F.2d at 464 (App. A-17).
>
> "[W]e . . . conclude that further proceedings in this case would result in a waste of judicial time and resources." 641 F.2d at 461 (App. A-12).
>
> "When a District Court . . . has had an opportunity to review the evidence and concludes that no reasonable jury would return a verdict for plaintiffs, *judicial economy mandates that summary judgment be entered.*" 641 F.2d at 464 (App. A-18). (Emphasis supplied.)

It is one thing to toss out truly frivolous lawsuits with an eye to judicial economy and limited resources. It is quite another, however, to allow such considerations to overrule a jury determination of legitimate and well-documented, albeit circumstantial, evidence of price-fixing.

That the plaintiffs had amassed sufficient circumstantial evidence of a price-fixing conspiracy is reflected by the decisions of two of the judges below in these proceedings. Judge Fairchild analyzed the evidence and concluded that plaintiffs should be given a chance to present their case to a jury because they had "presented evidence from which an agreement to fix prices may rationally be inferred . . ." 641 F.2d at 480 (App. A-52). Similarly, Judge McMillen of the District Court, who twice found triable issues of fact, clearly focused on the sharp disagreement between the parties as to the inferences to be drawn from the evidence, and ruled that ". . . the issue of credibility implicit in the plaintiffs' evidence cannot be resolved on a motion for summary judgment . . . ." (App. E-2).

The action taken by the trial court in this case, and condoned by the Circuit Court, was presaged in a comment made by Justice Black in his dissent in *Cities Service, supra,* at p. 304:

> "The plain fact is that this case illustrates that the summary judgment technique tempts judges to take over the jury trial of cases, thus depriving parties of their constitutional right to trial by jury."

The decision below simply disregarded the controlling decisions of this Court and other courts of appeals when it affirmed the granting of summary judgment to the defendants. If judges step into the jury box and decide factual disputes themselves, particularly when part of the reason for doing so is the potential burden on jurors, then the Seventh Amendment guarantee of the right to trial by jury is rendered meaningless. Such action cannot remain unchecked for the sake of the more than 350,000 class members in this case and for the sake of all litigants hereafter faced with a summary judgment challenge.

CONCLUSION

The court below required plaintiffs to prove a logical impossibility: that price-fixing is contrary to the economic interest of the price-fixers. The Court of Appeals opinion eliminates absolutely critical evidence of uniform pricing through an inversion of the rule of *Cities Service.* Thus, this Court's ruling in *Interstate Circuit, Inc.* v. *United States* goes unheeded, and the Seventh Circuit places itself in direct conflict with the Second Circuit in *Ambook Enterprises, Inc.*

The opinion below sanctions the use of Federal Rule of Evidence 403 to prevent jury trials in complex cases by weighing the potential prejudicial effect of relevant evidence on a non-existent jury.

The Seventh Circuit also resurrected *Peveley Dairy Co.* v. *United States* in disregard of law established by this Court and followed by other circuits.

Finally, the court below reversed the presumptions applicable to Rule 56 cases and drew every inference in favor of the moving parties. The decision is in derogation of the Seventh Amendment and circumvents *United States* v. *Diebold, Inc.* and *Poller* v. *Columbia Broadcasting System, Inc.* and is in clear conflict with settled precedent in every other circuit.

In approving such a gross deviation from long-standing procedural and substantive principles, the decision not only threatens the effectiveness of civil and criminal antitrust enforcement, but it also raises serious implications generally for the role of circumstantial evidence in the litigation of cases in all other areas of the law.

For all of the foregoing reasons, the petition for a writ of certiorari should be granted with respect to each of the four questions on which it is sought.

Respectfully submitted,

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July 10, 1981

APPENDIX

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APPENDIX A

Jack WEIT et al., Plaintiffs-Appellants,

v.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO et al., Defendants-Appellees.

Nos. 79-1077 & 79-2113.

United States Court of Appeals, Seventh Circuit.

Argued June 8, 1980.

Decided Feb. 11, 1981.

Class action was brought by bank charge card holders alleging, inter alia, that five banks conspired to fix rate of interest charged for extended payment privileges on credit card purchases. Motions for summary judgment were granted as to certain defendants, D.C., 467 F.Supp. 197. Subsequently, the United States District Court for the Northern District of Illinois, George N. Leighton, J., rendered summary judgment as to the remaining issues and defendants, and plaintiffs appealed. The Court of Appeals, William J. Campbell, Senior District Judge, sitting by designation, held that although evidence established parallel business behavior with regard to setting of interest rates and discount fees in conjunction with issuance of bank credit cards and established an opportunity to conspire, plaintiffs, despite eight years of discovery, failed to produce any significant probative evidence to support their claims of antitrust violations by five Chicago banks; thus, district

court properly entered summary judgment in favor of banks on claims of horizontal and vertical conspiracies.

Affirmed.

Fairchild, Chief Judge, filed dissenting opinion.

1. Federal Civil Procedure—2544
Monopolies—28(7.5)

Parallel business behavior is the type of circumstantial evidence which, absent more direct evidence, will be relied on in inferring unlawful agreement; however, when defendants come forward with denial sufficient to shift burden under summary judgment rule, plaintiffs must come forward with some significant probative evidence which suggests that conscious parallelism is result of an unlawful agreement. Fed. Rules Civ.Proc. Rule 56 (e), 28 U.S.C.A.

2. Monopolies—28(7.5)

Mere opportunity to conspire, even in context of parallel business conduct, is not necessarily probative evidence of an unlawful conspiracy. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

3. Federal Civil Procedure—2543

When plaintiff or prosecution relies on circumstantial evidence alone, the inference of unlawful agreement rather than individual business judgment must be compelling, if not exclusive, rational inference in order to require a trial on the merits. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Fed.Rules Civ.Proc. Rule 56, 28 U.S.C.A.

4. Federal Civil Procedure—2546

If district court, on eve of trial, concludes that extensive and complete discovery has produced no evidence to support

the complaint, summary judgment should be entered. Fed. Rules Civ.Proc. Rule 56, 28 U.S.C.A.

5. Federal Civil Procedure—2546

Although evidence established parallel business behavior with regard to setting of interest rates and discount fees in conjunction with issuance of bank credit cards and established an opportunity to conspire, plaintiffs, despite eight years of discovery, failed to produce any significant probative evidence to support their claims of antitrust violations by five Chicago banks; thus, district court properly entered summary judgment in favor of banks on claims of horizontal and vertical conspiracies. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Fed.Rules Civ.Proc. Rule 56, 28 U.S.C.A.

6. Evidence—146

District court, in ruling on banks' motion for summary judgment on plaintiffs' claims of antitrust violations with regard to setting of interest rates and discount fees in conjunction with issuance of bank credit cards, properly refused to consider evidence of banks' lobbying activities, which resulted in legislation increasing interest rates for reason that confusion of issues would have been the probable result of admission of such evidence.

7. Monopolies—28(1.6)

In order to have standing to maintain private action for treble damages in an antitrust case, a plaintiff must have been injured in his business or property and also show that he has sustained or is in immediate danger of sustaining some direct injury from defendant's actions and a plaintiff who does not have such a stake in the outcome lacks stand-

ing to maintain the action irrespective of merits of asserted claim. Clayton Act, § 4, 15 U.S.C.A. § 15.

8. Federal Civil Procedure—103
Monopolies—28(1.6)

Plaintiffs, cardholders of a bank's charge cards, lacked standing to complain of a vertical conspiracy between another bank and its correspondents with regard to setting of interest rate and discount fees in conjunction with issuance of bank charge cards and plaintiff would not be permitted to satisfy requirement that they have requisite stake in controversy by means of class action certification.

James E. Beckley, Chicago, Ill., for plaintiffs-appellants.

Keehan Landis, Bryson P. Burnham, Carl S. Lloyd, Jerald P. Earick, Chicago, Ill., for defendants-appellees.

Before FAIRCHILD, Chief Judge, CUDAHY, Circuit Judge, and CAMPBELL, Senior District Judge.*

CAMPBELL, Senior District Judge.

Plaintiffs appeal from the entry of summary judgment on their claim of a price-fixing conspiracy in violation of Sections 1 and 2 of the Sherman Act. The District Court concluded that after eight years of discovery plaintiffs had failed to produce any significant probative evidence to support the complaint.[1] Based on our review of the record

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* The Honorable William J. Campbell, Senior District Judge for the Northern District of Illinois is sitting by designation.

[1] *Welt* v. *Continental Illinois National Bank and Trust Co., et al,* 467 F.Supp. 197, 214 (N.D.Ill. 1978); and *Weit* v. *Continental Illinois National Bank & Trust Co.,* 478 F.Supp. 285, 298 (N.D.Ill. 1979).

we, too, conclude that plaintiffs are unable to point to any significant probative evidence in support of the allegations in the complaint. Accordingly, we affirm.

This class action was initiated in 1970 by three charge cardholders in the Midwest Bank Card System, Inc. and its successor the Interbank-Master Charge Card System, Inc. (Mastercharge), against five Chicago banks. The plaintiffs alleged that defendants, Continental Illinois National Bank & Trust Company of Chicago (Continental), Harris Trust and Savings Bank (Harris), Pullman Bank and Trust Company (Pullman), Central National Bank in Chicago (Central), and American National Bank and Trust Company (American), conspired to fix the interest rate paid by consumer credit cardholders on extended payments at 1.5% per month, or 18% per annum.[2] Plaintiffs alleged that defendants engaged in a horizontal conspiracy among themselves, and a vertical conspiracy among themselves and their respective correspondent banks in Illinois. Plaintiffs sought five hundred million dollars in damages before trebling and injunctive relief requiring renegotiation of cardholder rates on an individual basis.[3]

This controversy arises out of the formation of the Midwest Bank Card System by the defendant banks. As the District Court noted, the circumstances surrounding the formation of Midwest and its successor, Mastercharge, are not in dispute.[4] Those facts are set forth in detail in the District Court's opinion. See *Weit* v. *Continental Illinois National Bank & Trust Co.*, 467 F.Supp. 197, 200-205 (N.D.

[2] First National Bank of Chicago (First) was named as a coconspirator, but not as a defendant in this action.

[3] "Pursuant to free market criteria and individual credit ratings." Plaintiff's Third Amended Complaint, Count 1, Prayer for Relief.

[4] 467 F.Supp. at 199.

Ill. 1978). However, a brief summary of the Midwest system is appropriate.

In early 1966, First National Bank of Chicago held a meeting attended by representatives of Continental Harris and the Northern Trust to discuss the establishment of a compatible credit card program. The idea of establishing a credit card system was well received, and further meetings ensued. A representative of American also participated in these meetings as an observer.

The banks sought to establish a compatible credit card system. That is a system which permits a card issued by one bank to be used for purchases from participating merchants who deal with other banks. The card issuing bank provides the consumer with a plastic charge card. The cardholder agrees to pay his bank for monies advanced to cover purchases by the cardholder with the charge card. The cardholder can use the charge card to make purchases from any merchant who accepts the Midwest Charge card. The merchant simply forwards the signed charge ticket to his own bank, and is credited with the full amount of the charged purchase, less a small "discount" or fee. The merchant's bank then receives a credit from the cardholder's bank. At the end of each month the cardholder is billed by his bank for the total amount of purchases made during the period. The merchant's bank generates revenues by charging the merchant a fee or "discount" for its services. If the cardholder pays his bank the full amount due within a specified period, he incurs no finance or interest charge. If he defers payment however, his bank charges him interest on the unpaid balance. That interest rate, and how it was arrived at, is the subject of this controversy.

The Midwest Bank Card System, Inc. is a non-profit corporation established by the defendant banks, except Amer-

ican[5] to administer the compatible charge card system. The defendant banks established the Midwest System in 1966 to facilitate the transfer or "interchange" of funds among participating banks. The defendants maintain that compatibility and a facilitated interchange of funds is essential to a successful bank charge system. Midwest was established, they argue, solely to assue an efficient compatible system.

The defendant banks also contend that an important aspect of a compatible charge card system is the integration of correspondent banks into the system. A correspondent bank maintains a deposit balance with a larger Metropolitan bank. The Metropolitan banks, in turn, provide services to their correspondents. Since Illinois is a "unit banking" State which limits the use of branch banks,[6] major Metropolitan banks, such as the defendants, establish correspondent relationships with smaller banks in lieu of opening branches in other areas. Some banks would establish several correspondent relationships with major Metropolitan banks.[7] Each defendant recruited its correspondent bank to participate in the Midwest System. Plaintiffs claim that in doing so the defendants also conspired with their correspondent banks to fix the rate of interest charged at 18% per annum.

The initial meetings during the Spring and Summer of 1966, attended by representatives of defendants Continental and Harris, and by representatives of First and the Northern Trust, are outlined fully by the District Court and

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[5] American did not join the Midwest System until 1969.

[6] See Ill.Rev.Stat., Ch. 16½, § 106.

[7] For example, State National Bank of Evanston was a correspondent of Harris, American, First, Continental and Northern. It affiliated with Continental's charge card system in September of 1966.

need not be restated here. *See Weit* v. *Continental, supra*, at 200-205. Continental and Harris were joined by Central National Bank in the Fall. Northern Trust dropped out of the program in August of 1966. Representatives of Pullman, a correspondent of First, Harris and Continental, began attending meetings in August. On October 24, 1966, First, Continental, Harris, Central and Pullman executed an interim agreement establishing the Midwest System. Midwest's regulations permitted membership by any commercial bank. On March 26, 1969, American petitioned for membership and became a member on May 16, 1969.

From the outset the defendant banks were aware of the potential anti-trust problems inherent in a joint venture such as this. At an early meeting on May 26, 1966, lawyers for First raised the anti-trust issue. The group agreed at that time, on advice of counsel, to exclude from their discussion interest rates, fees, advertising, and market research. On July 25, 1966, Miles Seeley, counsel for Continental, submitted a memorandum to the group warning that discussions must be limited to planning a compatible credit card system and prohibiting any discussion of "fees, discounts, billing and extended credit terms."[8] Thereafter, a member of Seeley's firm was present at all meetings to assure that this policy was adhered to, and that interest rates were not discussed, "even in jest"[9] Initial drafts of the "Compatible Credit Card System for Chicago Area Banks" also stated that card issuing banks "will be completely and solely responsible to determine . . . credit policies and interest rates."[10]

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[8] Krazley deposition ex. 8E; Prater deposition, ex. 50, excerpt from Prater deposition, app. 224-225.

[9] *Id.* at p. 225.

[10] Wood deposition, exhibit 6.

Nevertheless, plaintiffs argue, each defendant bank arrived at the same interest rate.[11] The defendants had ample opportunity to discuss interest rates at meetings of the Midwest group, at annual bankers' meetings, and even on social occasions. Plaintiffs point to several instances in the record where representatives of the defendant banks did discuss interest rates, though in the context of Illinois usury regulations. Plaintiffs further rely on an affidavit submitted by their expert, Bernard Shull, to the effect that "conscious cooperation" on the part of the members of the Midwest System was the likely cause of the 18% interest rate.

Plaintiffs argue that in addition to these factors which were considered by the District Judge, the lobbying efforts by the defendant banks also suggest the existence of a price fixing conspiracy. Those lobbying efforts were expressly not considered by the District Court.[12]

When the Illinois General Assembly convened in 1967, several bills were introduced regulating interest charged on consumer credit cards. The general interest rate limit under

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[11] While each bank charged a rate of 1.5% per month, the banks did not employ the identical method of calculating interest. For example, Continental computes interest on an "Adjusted Balance Method", that is, by calculating interest on the balance due during the previous billing cycle to the date of a payment, and then computing interest on the remaining balance, if any, up to the current statement. Harris employs a "Closing Balance Method" whereby all payments received during a billing cycle are deducted from the previous balance. Central and American compute interest on the basis of an average daily balance during a given billing cycle. Pullman calculates interest on the basis of the balance due at the beginning of a billing cycle, without crediting for payments made. These differing methods of computation result in a slightly different cost of borrowing to the cardholder.

[12] *Weit* v. *Continental*, 467 F.Supp. at 207-208, Nt. 22.

the Illinois Usury Statute was 7% per annum. The Chief Counsel to the Illinois Comptroller[13] had, however, issued separate opinion letters to First and Continental indicating that National Banks could, under the Consumer Finance Act, charge 3% interest per month on balances up to $150, 2% on balances between $150 and $300, and 1% on the remaining balance above $300. There was no Illinois precedent in accord with that conclusion. Several of the bills pending in the Legislature would have limited charge card interest to 1% per month. The defendant banks engaged a lobbyist, William R. Dillon, to seek passage of a bill which would permit monthly credit card interest of 1.5%. Dillon's efforts were successful, as the Legislature approved House Bill 2071 which contained the 1.5% limit.

Plaintiffs contend that this evidence, provided by sworn affidavit or deposition, should at least create a genuine issue of material fact sufficient to defeat a defense motion for summary judgment under Rule 56, F.R.C.P.

The District Court found that the defendant's parallel interest rate; the opportunity to conspire to fix those rates; the specific references to interest rates in the record; and the opinion of Professor Shull did not create a reasonable inference of the conspiracy which plaintiff's alleged. 467 F.Supp. at 210-211. In support of their motion for summary judgment, defendants, as they must, came forward with testimony under oath refuting plaintiffs' allegations. This evidence showed that each defendant had independently projected the costs and early losses from the credit card system, and independently arrived at 1.5% per month as the minimum interest rate they could charge. The Court below

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[13] Defense counsel continually refer to this agency as the "Comptroller of the Currency". We note that no such office exists, and under Article I, Section 8 of the U.S. Constitution could not exist.

noted that every employee of the defendant banks who participated in the formation of Midwest denied, under oath, that there had been any discussion relating to a fixed or agreed interest rate. The Court found that the parallel rates were not surprising since each defendant faced the "identical problems of fraud, credit losses, and large initial expense, to which reasonable businessmen would react in the same fashion." 467 F.Supp. at 210-211.

Also, the Court noted that 1.5% per month was the rate then charged on other consumer credit cards and by retail establishments offering their own credit.

The Court found that defendants had shifted the burden to the plaintiffs to come forward with "significant probative evidence to support the complaint," citing *First National Bank of Arizona* v. *Cities Service*, 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968). The District Court concluded that, after more than eight years of discovery,

> . . . plaintiffs have confronted every person who attended those meetings, examined the minutes of and documents generated by each meeting, and found no evidence which affirmatively supports their theory. 467 F.Supp. at 211.

SUMMARY JUDGMENT

Rule 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact . . ." Rule 56(e) provides that when a motion for summary judgment is supported by sworn denials, as is the case here, the burden shifts to the plaintiff to "set forth specific facts showing that there is a genuine issue for trial."

By entering summary judgment the Court is, in effect, concluding that based on the evidence upon which the plain-

tiff intends to rely at trial, no reasonable jury could return a verdict for the plaintiff.[14]

In the instant case the District Judge reviewed the evidence in the record at the conclusion of a lengthy period of discovery and found no significant probative evidence of a conspiracy to fix interest rates. Based on our independent review of the record, we, too, are unable to uncover any such evidence, and conclude that further proceedings in this case would result in a waste of limited judicial time and resources.[15]

THE ALLEGED HORIZONTAL CONSPIRACY

[1] Plaintiffs contend that circumstantial evidence in the record—parallel rates and the opportunity to conspire—are sufficient to meet their burden under Rule 56(e). Clearly, circumstantial evidence can be sufficient to support a find-

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[14] In plaintiffs' answers to interrogatories filed January 6, 1978, plaintiffs identified the 964 documents and 53 witnesses on which they intended to rely at trial.

[15] The dissent suggests that plaintiffs produced evidence that Continental, Harris and Pullman knew the interest rates being contemplated by each other. This evidence is that Harrris noted that states other than Illinois permitted an interest rate of 1½% per month, and that Continental referred to a "regular 1½% per month interest charge" during the course of discussions with the President of Bank Americard. This is hardly evidence that Pullman, Harris or Continental knew what interest charge had been decided upon by each bank. Yet even assuming that awareness of contemplated interest rates is the logical inference to be drawn from those statements, mutual awareness of similar conduct does not run afoul of the Sherman Act. "This awareness must be an element entering into each party's decisional process, and the basis for inferring that it did no must be something more substantial than a guess." *Brown* v. *Western Massachusetts Theatres, Inc.*, 288 F.2d 302, 305 (1st Cir. 1961) (on petition for rehearing).

ing of a price-fixing conspiracy. *Interstate Circuit* v. *United States*, 306 U.S. 208, 59 S.Ct. 467, 83 L.Ed. 610 (1939). Parallel business behavior or "conscious parallelism" is the type of circumstantial evidence which, absent more direct evidence, will be relied on in inferring unlawful agreement. *Theatre Enterprises* v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 540, 74 S.Ct. 257, 259, 98 L.Ed. 273 (1954). However, when defendants come forward with denials sufficient to shift the burden under Rule 56(e), plaintiffs must come forward with some significant probative evidence which suggests that conscious parallelism is the result of an unlawful agreement. *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 289-90, 88 S.Ct. 1575, 1592-1593, 20 L.Ed.2d 569 (1962); *Modern Home Institute, Inc.* v. *Hartford Accident and Indemnity Co.*, 513 F.2d 102 (2d Cir. 1975). Parallel behavior and the hope that something further can be developed at trial is not sufficient to warrant a trial on the merits. *Cities Service* at 290, 88 S.Ct. at 1593; *Perma Research and Development Co.* v. *Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969). Conscious parallelism in the instant case could support a wide range of inferences. One logical inference is that the 1½% per month interest rate reflected a business decision as to what rate the market for consumer credit would bear, and eventually prove profitable as well. An equally plausible inference, and one supported in the record, is that the already established rate of consumer credit was 1½% per month, as reflected by Bank Americard and retail outlets offering installment credit.[16] If plaintiffs are to proceed to trial, they must be able to point to some probative evidence that parallel interest rates

[16] The record indicates that the Wall Street Journal, on May 24, 1966 noted Bank Americard's interest rate of 1½% per month and that the defendants were aware of this. Ex. A to Continental's response to Interrogatories, January 3, 1978, pp. 23-24.

resulted from unlawful agreement rather than lawful business reasons.

[2] Plaintiffs rely heavily on the opportunity to conspire as probative evidence of unlawful conspiracy. The dissent also attaches significance to the close personal ties among the members of the Chicago banking community. Yet, the mere opportunity to conspire,[17] even in the context of parallel business conduct, is not necessarily probative evidence. *See Venzie Corporation* v. *United States Mineral Products Co.*, 521 F.2d 1309 (3rd Cir. 1975); *Overseas Motors, Inc.* v. *Import Motors Ltd.*, 375 F.Supp. 499, 535 (E.D.Mich. 1974), *aff'd* 519 F.2d 119 (6th Cir. 1975). This is especially the case when the need to set up a compatible card system requires a degree of cooperation. The only rational inference here is that the need to set up a compatible system mandated that defendants work together. Given the need for some degree of cooperation in a venture of this nature, the opportunity to conspire evidence lacks significant probative value. Of greater significance is the sworn testimony compiled during eight years of depositions which uniformly denies discussion of any agreement or understanding as to the interest rate to be charged.

[3] It is suggested that while parallel pricing alone is not sufficient to establish a price-fixing conspiracy, such evidence together with an opportunity to conspire is sufficient to rebut defendants' denials and require a trial on the merits. *See C-O-Two Fire Equipment Co.* v. *United States*, 197 F.2d 489 (9th Cir. 1952), *cert. denied* 344 U.S. 892,

[17] The District Court characterized the bulk of this evidence as falling into the "mere possibility range." 467 F.Supp. at 211. We agree. The fact that the Chairman of Harris and Continental both served as trustees of Northwestern University is of little relevance, much less probative value.

73 S.Ct. 211, 97 L.Ed. 690 (1952); *Esco Corporation* v. *United States*, 340 F.2d 1000 (9th Cir. 1965).[18] However, when the plaintiff or prosecution relies on circumstantial evidence alone, the inference of unlawful agreement rather than individual business judgment must be the compelling, if not exclusive, rational inference. *Pevely Dairy Co.* v. *United States*, 178 F.2d 363 (8th Cir. 1949). Indeed, the Court in *Pevely* stated:

> Where circumstantial evidence is relied upon to establish the conspiracy or any other essential facts, it is not only necessary that all the circumstances concur to show the existence of such conspiracy and facts sought to be proved, but such circumstantial evidence must be inconsistent with any other rational conclusion.[19]

Pevely, as well as *C-O-Two* and *Esco* were criminal cases with differing standards of proof. Nevertheless, it is interesting that the court in *C-O-Two* distinguished *Pevely* on the basis of the product in question. The Court stated the milk (the alleged price-fixed product) "approaches fungibility."[20] The defendants did business in the same area, paid a fixed regulated price for the product and incurred virtually identical labor costs. Similarly, in civil antitrust cases, Courts have noted that parallel pricing or conduct lacks probative significance when the product in question is standardized or fungible. *Bendix Corporation* v. *Ballax, Inc.*, 471 F.2d 149, 160 (7th Cir. 1972); *Independent Iron*

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[18] We note that in both *C-O-Two* and *Esco* numerous co-defendants entered pleas of nolo contendere prior to the trial of these named co-defendants.

[19] 178 F.2d at 367. In *Pevely* the Court reversed the district court's denial of a motion for judgment of acquittal after the jury returned a guilty verdict.

[20] *C-O-Two*, 197 F.2d at 496.

Works, Inc. v. *United States Steel Corp.*, 322 F.2d 656 (9th Cir. 1963).[21]

In the instant case, the product in question is consumer credit, or more fundamentally, the cost of borrowing money for a given period. The underlying product—money—is not only fungible, it is by definition an interchangeable medium of exchange. The defendants' own cost of money is highly regulated and, on a given day and specified amount, the cost is uniform. Thus, it is hardly surprising, or significant, that the defendants charged a parallel interest rate[22] given their parallel costs. We agree with the District Court's conclusion as to the only rational inference to be drawn from parallel pricing in this case:

> The showing of parallel behavior under these circumstances, where each bank faced identical problems of fraud, credit losses, and large initial expense to which reasonable businessmen would react in the same fashion, does not provide a basis for the inference of the conspiracy which plaintiffs allege.[23]

Thus, parallel interest rates, together with evidence that the opportunity to conspire existed—when measured against defendants' denials, parallel economic cost factors, and the need for a compatible charge card system—does not support a rational inference of an unlawful conspiracy.

Plaintiff's suggest that summary judgment should rarely be entered in anti-trust cases due tothe central role of motive and intent issues. *See Poller* v. *Columbia Broadcasting*

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[21] In *Bendix* this Court overturned the trial court's finding of improper price influencing for lack of evidence. In *Independent Iron Works* the Court affirmed the trial court's directed verdict on a concerted boycott claim.

[22] As indicated at footnote 11 *infra*, the cost of borrowing to the cardholder is not identical at each bank due to the individual bank's method of calculating interest.

[23] 467 F.Supp. at 210-11.

System, Inc., 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962). However, no greater caution or concern for litigants' rights is required in the anti-trust context than in other substantive areas of Federal Court litigation. *Lupia* v. *Stella D'Oro Biscuit Company Inc.*, 586 F.2d 1163, 1167 (7th Cir. 1978), *cert. denied* 440 U.S. 982, 99 S.Ct. 1791, 60 L.Ed.2d 242 (1979).

This Circuit has recognized that "the very nature of anti-trust litigation would encourage summary disposition . . . when permissible." *Lupia* v. *Stella D'Oro*, 586 F.2d at 1167. The statutory remedy of treble damages creates a "special temptation for the institution of vexatious litigation." *Id.*, citing *Poller*, 368 U.S. at 478, 82 S.Ct. at 493 (Harlan, J., dissenting). Also, anti-trust actions have proven to be especially protracted, and difficult for jury consideration. *See United States* v. *United Gypsum Co.*, 438 U.S. 422, 465—469, 98 S.Ct. 2864, 2887—2889, 57 L.Ed.2d 854 (1978); *ILC Peripherals Leasing Corporation* v. *International Business Machines Corporation*, 458 F. Supp. 423, 445—448 (N.D. Cal.1978). Indeed, in the *ILC* case the District Judge, after a five month trial which ended in a deadlocked jury and a mistrial, concluded that the case was "beyond the ability and competency of any jury to understand and decide rationally." 458 F.Supp. at 448.

We simply turn our heads and ignore the practical realities of complex anti-trust litigation. A trial of this nature places a substantial burden on jurors who are seldom prepared to analyze the complexities of anti-trust claims.[24]

[24] When the Court in *ILC* asked the foreman of the jury whether this type of case should be tried to a jury, the foreman responded: "If you can find a jury that's both a computer technician, a lawyer, an economist, knows all about that stuff, yes, I think you could have a qualified jury, but we don't know anything about that". (Tr. 19,548). 458 F.Supp., at 447.

As Chief Justice Burger has so appropriately noted: ". . . it borders on cruelty to draft people to sit for long periods to cope with issues "largely beyond their grasp."[25]

[4] When a District Court has afforded the parties eight years of unlimited discovery, the parties have designated the evidence on which they will rely at trial, and the Court has had an opportunity to review the evidence and concludes that no reasonable jury could return a verdict for plaintiffs, judicial economy mandates that summary judgment be entered. See e.g. *Modern Home Institute, Inc.* v. *Hartford Accident & Indemnity Co.*, 513 F.2d 102 (2d Cir. 1975). A trial on such claims would serve only as a forum for impeachment and argument by counsel; not for the presentation of evidence. If the District Court, on the eve of trial, concludes that extensive and complete discovery has produced no evidence to support the complaint, summary judgment should be entered. As the Court noted in *Cities Service*:

> While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an anti-trust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint. 391 U.S. at 290, 88 S.Ct. at 1593.

[5] We believe the instant case is precisely the kind contemplated by the Court in *Cities Service*. The allegations have been met with consistent sworn denials and there has been a more than adequate period of discovery. Yet, plaintiffs can point to only two instances where interest rates

[25] Remarks of the Chief Justice of the United States, Meeting of Conference of Federal Chief District Judges, Little America Hotel, Flagstaff, Arizona, Aug. 7, 1979.

were even discussed, and then only in the context of state usury laws, or the rate that Bank Americard was charging.[26] These two statements relating to interest rates during the several years of planning and implementation of the Midwest System, even when coupled with rate parallelism and an opportunity to conspire, do not rise to the level of "significant probative evidence" within the meaning of *Cities Service.*

Plaintiffs suggest that *Cities Service* is inapposite because that case involved a claim of refusal to deal rather than price fixing.[27] When price fixing is alleged, they suggest, circumstantial evidence should receive greater weight on a motion for summary judgment. Yet, a conspiracy to fix prices and a group boycott are both proscribed by Section 1 of the Sherman Act. Both are *per se* violations of the Act.[28] Neither case lends itself to proof by direct evidence. There is no basis for altering the standard for summary judgment to conform to a lesser quantum of evidence in either case. If plaintiffs' circumstantial evidence of conspiratorial conduct is so insignificant that a rational jury could not find for plaintiffs, summary judgment is appropriate irrespective of the substantive nature of the complaint.

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[26] The dissent attaches considerable significance to the use of the term "regular interest" rate in the discussion with Bank America. Yet that was the "regular" rate charged Bank Americard holders.

[27] Plaintiffs attempt to classify *Cities Service* as an "individual refusal to deal" case. It is not. The complaint alleged concerted conduct. Indeed, since Section 1 of the Sherman Act proscribes "every contract, combination . . . or conspiracy in restraint of trade . . ." individual conduct does not run afoul of Section 1, by definition.

[28] *See Klors Inc.* v. *Broadway-Hale Stores,* 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959); *U.S.* v. *Socony Vacuum Oil Co.,* 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940).

The dissent suggests that in the instant case, unlike in *Cities Service*, plaintiff has produced evidence of motive. It is suggested that this motive evidence distinguishes *Cities Service* from this case. In *Cities Service* the plaintiff[29] alleged that Cities Service Co. and six other large oil companies refused to purchase oil from him because plaintiff was selling Iranian oil. The alleged motive for the group boycott was retaliation against nationalization of property owned by one of the defendants, and an effort to force return of the property by a boycott of all oil produced in that country. The Court found that given no contrary evidence a jury "might well be presented as to Cities' motives in not dealing with Waldron."[30] However, the Court affirmed the entry of summary judgment because "the record . . . contains an overwhelming amount of such contrary evidence of Cities' motives."[31] Similarly, a motive is suggested for conspiratorial conduct in the present case, but the evidence in the record does not suport that motive. The dissent mistakenly construes defendants' concern about "chaos in the market" as an admission of anti-competitive motive in forming the Midwest System.[32] Clearly, the defendant banks were concerned with the possibility that either an out-of-state bank or one Chicago bank would initiate its

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[29] The original plaintiff was Gerald Waldron. Upon his death the First National Bank of Arizona, his executor, was substituted as plaintiff. *See Cities Service*, 391 U.S. 253, 259 n. 1, 88 S.Ct. at 1578 n. 1.

[30] 391 U.S. at 277, 88 S.Ct. at 1586.

[31] Id.

[32] A Continental internal memo of August 11, 1966 noted, "if anyone goes in Chicago, others will and this may result in chaos in the market. Could be disasterous [sic] . . ."

own credit card system.[33] If each bank in Chicago plus several large out-of-state banks initiated their own system, the likely result would be chaotic. The evidence suggests, however, that by chaos the banks did not mean competition as to interest rates, but a retail market in which a vast number of charge cards existed. Merchants would have to accept many if not all of these cards and then would have to look to each individual bank for payment. A compatible system permits the merchant to look to his own bank for the entire payment irrespective of which bank may have issued the card to the customer. While defendants were clearly concerned about a chaotic credit card market, the record sugests their concerns were not anti-competitive or conspiratorial. Rather, they were legitimate business concerns. We therefore, do not agree with the dissent's finding of an anti-competitive motive in this case.

Plaintiffs rely, as does the dissent, on *Poller* v. *Columbia Broadcasting*, 368 U.S. 446, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962) in support of the contention that issues of anti-competitive intent are particularly appropriate for jury consideration. The Court in *Cities Service* noted several factual distinctions between that case and *Poller* which could be applied in the instant case as well.[34] Ultimately, however, these other cases are distinguished on the basis

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[33] A Harris internal memorandum of December, 1966 noted, "it would be very difficult for any one bank in Chicago to successfully operate a broad credit plan in our area because of our unit banking system. And, even if tried, others would soon initiate similar and competitive plans resulting in a chaotic state of affairs as far as the public and the merchants were concerned."

[34] For example, the Court in *Cities Service* noted that in *Poller* a competitive relationship existing between the plaintiff and defendant. In both *Cities Service* and the instant case there is no competitive business relationship. 391 U.S. at 285, 88 S.Ct. at 1590.

of the inferences which may reasonably be drawn from the evidence in the record. Our review of the record leads us to the conclusion that the circumstantial evidence in support of the complaint is so insubstantial when measured against the evidence in support of defendants' denials, as to preclude a verdict for plaintiffs. Summary judgment on the claims of horizontal conspiracy is therefore appropriate.

EVIDENCE OF LOBBYING ACTIVITIES

[6] Plaintiffs also contend that the District Court erroneously declined to consider the evidence of defendants' lobbying activities, and that had that evidence been considered, summary judgment should have been denied. The dissent concurs in that view.

The argument for admissibility of this evidence is that it is relevant to the question of whether defendants conspired to fix interest rates. As the dissent points out, an inference can be drawn that the banks would not have worked together in lobbying for passage of a bill in the legislature unless they had implicitly agreed on an interest rate as well. We agree that such an inference could be drawn. Our problem with this evidence is that it more directly suggests an agreement to influence legislation on behalf of a particular bill under consideration. In *Eastern Railroads Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), the Court held that such conduct does not violate the Sherman Act, even though there may be an anti-competitive motive behind such conduct.[35] In *United Mine Workers of America* v. *Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965), the Court reaffirmed that principle. The Court in *Pennington* noted:

[35] 365 U.S. at 140, 81 S.Ct. at 531.

> Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself, violative of the Sherman Act.[36]

The District Court noted that such conduct is immunized from anti-trust liability under the *Noerr-Pennington* doctrine, but stopped short of excluding it on that basis.[37] Rather, the District Judge concluded that the prejudicial quality of this evidence outweighed its probative value. Since he would exclude such evidence at trial, he declined to consider it on summary judgment. The basis for the Court declining to consider this evidence was its "minimal probative value" as compared to its "inevitable prejudicial effect."

Rule 403 of the Federal Rules of Evidence permits the Court to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . ."[38] The evidence of defendants' lobbying activity poses a serious problem of confusion of issues.[39] The likely confusion is that the jury will consider this evidence as probative of an agreement to influence public officials to enact a favorable interest rate. While an inference of a separate

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[36] 381 U.S. at 670, 85 S.Ct. at 1593.

[37] 467 F.Supp., at 207-208 N. 22.

[38] Generally, the Rules of Evidence apply to pre-trial proceedings including summary judgment considerations. *See* F.R.E. 101; *American Security Co.* v. *Hamilton Glass Co.*, 254 F.2d 889, 893 (7th Cir. 1958).

[39] The dissent suggests that 403 is designed to exclude only that evidence which tends to horify, or evoke sympathy or anger. While the tendency to suggest an emotional decision is one basis for exclusion of evidence under Rule 403, it is clearly not the only one. Advisory Committee Notes quoted in Weinstein's Evidence 403[03].

agreement to fix consumer credit rates could be drawn from this evidence, the more direct link is to the defendants' legislative efforts which *Noerr-Pennington* immunizes from anti-trust liability. An appropriate cautionary instruction could be fashioned so as to draw the jury away from consideration of the immunized conduct as the antitrust tort and toward other possible inferences. Yet, the more likely result is that the jury, unskilled in the constitutional considerations of *Noerr-Pennington*, would conclude that the passage of a favorable consumer credit limit was the product of an unlawful conspiracy. We believe that confusion of issues is the probable result of admission of this evidence. Given the lack of any substantial evidence of an antitrust conspiracy in the instant case, the threat of prejudice from admission of this evidence is considerable. The lack of other probative evidence of conspiracy would serve to focus the jury's attention on the lobbying evidence. This could easily result in a finding of antitrust liability for engaging in the First Amendment right to petition which *Noerr-Pennington* protects. We believe the District Court correctly excluded this evidence from consideration on the motion for summary judgment.

THE ALLEGED VERTICAL CONSPIRACY

Plaintiffs also claim that Continental, Harris, Central and Pullman conspired between themselves and their correspondent banks to fix interest rates charged to consumers and discount rates charged to merchants, in violation of Section 1 of the Sherman Act. The District Court entered summary judgment on the claim of vertical price-fixing by Continental in its Order of December 22, 1978. 467 F.Supp. 214-216. The rationale for entry of summary judgment was that the plaintiffs, in the face of sworn denials by Continental, had failed "to produce any significant probative

evidence . . . that a conspiracy existed." *Id.* at 216, citing *Lamb's Patio Theatre* v. *Universal Film Exchanges,* 582 F.2d 1068, at 1070. The District Court entered summary judgment for defendants Harris and Central in its order of September 6, 1979.[40] The District Court noted at the outset the plaintiffs were cardholders of Continental and not within the "target area" of any conspiracy between defendants. The Court concluded that since plaintiffs could not have suffered any damage as a result of such conspiracy they cannot represent any class of persons holding cards issued by Harris, Central or Pullman. The Court went on to find that even assuming standing plaintiffs had failed to point to any evidence suggesting that interest rates were the result of anything other than independent business decisions. The Court also noted that the vertical conspiracy allegations "must fail because the basis for their existence—the allegation of a conspiracy among the named defendants —can no longer be maintained in light of this Court's ruling of December 22, 1978." 478 F.Supp. at 298.

With regard to plaintiffs' claims against Pullman, the Court found that there were sufficient "plus factors" to withstand summary judgment. However, plaintiffs had no standing to raise a claim against Pullman since they were not cardholders of the charge cards issued by Pullman or its correspondent banks.

The District Court has given a comprehensive summary of the role played by correspondent banks and their relationship to the named defendant banks which need not be recapitulated here.[41] We agree with the District Court's

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[40] 478 F.Supp. 285 (N.D.Ill.1979).

[41] For a discussion of Continental's relationship with its correspondents, *see* the District Court opinion, 467 F.Supp. at 202-204, 215-216. Harris' and Central's correspondent relationships are detailed at 478 F.Supp. 290-294, 297-298. Pullman's correspondent relationships are set out at 478 F.Supp. 290-291 and 297-299.

conclusion that once judgment is entered as to the horizontal conspiracy claim there is little viability remaining to the vertical conspiracy claim. Nevertheless, the issue of standing aside, a genuine issue of fact as to a violation of the Sherman Act, Section 1, would exist had plaintiffs presented evidence of an agreement between the defendants and their respective correspondents to fix interest rates or discount fees.

Defendant Continental supported its motion for summary judgment by affiidavits of its Vice President in charge of correspondent banking to the effect that no agreement to set rates existed between Continental and its correspondents because Continental *alone* set the interest rate charged on all charge cards issued through its correspondents. The standard contracts between Continental and its correspondents support that position. The only fact which could provide any support for any anti-trust theory was that Continental and its correspondents did not compete for charge card customers. That alone does not create an inference of conspiracy. To the contrary, in light of the evidence demonstrating the high costs of the Midwest System, the more reasonable inference is that the correspondents did not compete because they were not in a financial position to do so. The evidence before the District Court shows that Continental set the terms and conditions of its credit card—including the interest rate it would charge cardholders—and conveyed that decision to its correspondents.[42] The correspondents were free to accept Continental's terms, affiliate with another system,[43] or start their own credit card network. We believe the District Court correctly concluded

[42] See e. g. deposition of Alfred Lindgren, pp. 60-61 and depo., ex. No. 9.

[43] Such as the Bank Americard System which the First had become affiliated with.

that there was no evidence on which a jury could find a conspiracy between Continental and its correspondents.

With regard to Harris, the District Court found that Harris simply purchased receivables generated by its correspondent banks until January of 1968. At that point Harris offered its correspondents an opportunity to share in the risk and profits or losses on receivables generated by the correspondents. From that point until late 1974, Harris, unlike Continental, let its correspondents decide on the interest rate charged to their customers. Harris required a 1.5% return on its share of those receivables at first, but changed to a set fee paid by the correspondents. At no point during this period did Harris require its correspondents to charge any prearranged interest rate. In 1974 Harris switched to a system similar to Continental's whereby Harris issued cards to those cardholders referred by its correspondent banks, and Harris alone set interest rates.

With respect to Central, the District Court found that it did not begin soliciting correspondent banks until 1970.[44] At that time Central issued bank charge cards to some customers referred by correspondents and also permitted correspondents to issue their own cards. Central did not make any provision for interest rates in any contracts with its correspondents.

In the face of what the Court below found to be legitimate business relationships, plaintiffs are unable to point to any evidence of agreement or conspiracy. Here, as in the alleged horizontal conspiracy, plaintiffs can point only to the opportunity to conspire; the ability to conspire; but no evidence of actual conspiracy. The District Court correctly concluded that this is not sufficient to create a genu-

[44] Central was itself a correspondent of both Continental and Harris.

ine issue of material fact as to the existence of a conspiracy. *First National Bank of Arizona* v. *Cities Service,* 391 U.S. at 286-288, 88 S.Ct. at 1591-1592. *See also Lupia* v. *Stella D'Oro Biscuit Co., Inc.,* 586 F.2d 1163 (7th Cir. 1978) *cert. denied* 440 U.S. 982, 99 S.Ct. 1791, 60 L.Ed.2d 242 (1979).

STANDING TO MAINTAIN THE VERTICAL CONSPIRACY CLAIMS

The District Court noted that plaintiffs lack standing to complain of any injury resulting from Harris' and Central's relationship with their correspondent banks. Yet, the Court went on to find that even assuming standing to challenge the alleged vertical conspiracy plaintiffs had failed to point to any significant evidence of an agreement to fix interest rates between Harris and Central and their correspondent banks. Because we affirm the entry of summary judgment on that basis we need not address the standing question as it relates to Harris and Central. With regard to Pullman, however, the District Court dismissed the vertical conspiracy claim solely on the basis of standing. We, therefore, address the question of whether plaintiffs have standing to assert a vertical conspiracy claim against Pullman.

[7] Section 4 of the Clayton Act, 15 U.S.C. § 15, permits anyone who has been "injured in his business or property" to maintain a private action for treble damages. As the Supreme Court's opinion in *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977) indicates, the injury must be a direct one. In addition to this requirement of "antitrust injury," a plaintiff in any lawsuit must show that he has sustained or is in immediate danger of sustaining some direct injury from the defendant's actions. *O'Shea* v. *Littleton,* 414 U.S. 488, 494, 94 S.Ct. 669, 675, 88 L.Ed.2d 674 (1974); *Sierra Club* v. *Morton,* 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed 2d 636 (1972). A plaintiff who does

not have such a stake in the outcome lacks standing to maintain the action irrespective of the merits of the asserted claim.

The Court below noted, as has this Court, that the distinction between the "antitrust injury" requirement of Section 4 and the more general standing requirement is often blurred. 478 F.Supp. at 297. *See also Lupia* v. *Stella D'Oro Biscuit Co., Inc.*, 586 F.2d at 1168-69. This is not surprising in antitrust actions as the two requirements overlap considerably. The labels are not important, however. The fundamental requirement is that plaintiffs establish a sufficient nexus between the defendant's alleged actions and an injury to plaintiffs.

[8] Here the plaintiffs are unable to establish that nexus. The named plaintiffs are cardholders of only Continental's Midwest chargecards. The fact that they purport to represent Pullman cardholders who would have standing to complain of a vertical conspiracy between Pullman and its correspondents cannot create standing to bring an action. If plaintiffs lack the requisite stake in a controversy at the time the complaint is filed, they may not bootstrap that element into their claim by means of class action certification. *Kauffman* v. *Dreyfus Fund, Inc.*, 434 F.2d 727, 734 (3d Cir. 1970). Similarly, plaintiffs who have not suffered antitrust injury from an alleged conspiracy cannot bring themselves within the "target area" simply by purporting to represent those who are. *See Lupia* v. *Stella D'Oro*, 586 F.2d at 1168-69. The District Court correctly concluded "the named defendants could not have been injured by any conspiracy between Pullman and its correspondents and lack standing to raise any claim against Pullman." 478 F.Supp. at 299.

For the reasons set forth herein, the judgment of the District Court is AFFIRMED.

FAIRCHILD, Chief Judge, dissenting.

Plaintiffs alleged that defendants, five Chicago banks, violated sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, by conspiring between themselves and with their correspondent banks to fix the interest rates they charged as member banks of the Midwest Bank Card System, Inc., and its successor, the Interbank-Master Charge System, Inc. ("Mastercharge"). The district court entered summary judgments for all defendants on all counts.[1] I would affirm the summary judgments for defendants Continental, Harris and Central as to the charges of a vertical conspiracy with their respective correspondents. I would reverse the summary judgment granted to defendants Continental, Harris, Central and Pullman on the horizontal conspiracy.

I. THE STANDARD OF REVIEW

The issue before this court is whether this court is satisfied that a properly instructed jury, giving full weight to plaintiffs' evidence, drawing every reasonable inference in its favor, and subjecting defendants' evidence to a critical eye, could not rationally find that plaintiffs were entitled to any relief. *Ambook Enterprises* v. *Time, Inc.*, 612 F.2d 604, 611 (2d Cir. 1979), *cert. dismissed*, ____ U.S. ____, 101 S.Ct. 35, 65 L.Ed.2d 1179 (1980). *See Continental Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 696, 82 St.Ct.

[1] The district court's opinion granting summary judgment for defendants Continental, Harris and American as to the charges of horizontal conspiracy and for Continental as to the charge of vertical conspiracy is reported in *Weit* v. *Continental Ill. Nat'l Bank & Trust Co.*, 467 F.Supp. 197 (N.D.Ill.1978) (hereinafter "*Weit I*"). The decision granted summary judgment for defendants Central and Pullman on both the horizontal and vertical conspiracy claims and for defendant Harris on the vertical conspiracy claim is reported at *Weit* v. *Continental Ill. Nat'l Bank & Trust*, 478 F.Supp. 285 (N.D.Ill.1979) (hereinafter "*Weit II*").

1404, 1409, 8 L.Ed.2d 777 (1962).[2] That the issues may be particularly difficult for jury consideration is immaterial to the merits of plaintiffs' claim. The court should only consider whether, after examining all the evidence, plaintiffs' case remains devoid "of *any* significant probative evidence tending to support the complaint." *Ambook Enterprises* v. *Time, Inc., supra,* 612 F.2d at 611, citing *First National Bank of Arizona* v. *Cities Service Co.,* 391 U.S. 253, 290, 88 S.Ct. 1575, 1593, 20 L.Ed.2d 569 (1968).

II. THE HORIZONTAL CONSPIRACY

A.

As the majority and the district court noted, the circumstances surrounding the formation of Midwest in 1966 and its successor, Mastercharge, are not in dispute. *Weit I,* 467 F.Supp. at 199. The significance of plaintiffs' evidence introduced in support of their allegations of a horizontal conspiracy is more readily apparent, however, when viewed in light of certain salient facts about the Chicago banking community and the credit card industry at the time of Midwest's formation. Plaintiffs produced evidence to show the following.

In 1966, the Chicago banking market was an oligopoly dominated by First National Bank[3] and Continental.[4] Illi-

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[2] On appeal from a grant of summary judgment, the appellate court is to review the record and determine for itself whether there are any genuine issues of material fact. 6 Pt. 2 *Moore's Federal Practice* 56.27[1], at 56-1555 (2d Ed. 1980).

[3] First was named as a non-defendant co-conspirator in Counts I and III of plaintiffs' third amended complaint. Although First was a founding member of Midwest, it left Midwest and joined the Bank Americard System in 1970. *Weit I,* 467 F.Supp. at 200 n. 3.

[4] Shull Aff. at 2.

Defendants Harris and Pullman are state chartered banks, and defendants Continental and Central are nationally chartered banks, as is First National Bank.

nois prohibitions against branch banking[5] contributed to this high level of concentration.[6] Defendants' officers knew each other personally, attended many of the same functions, and were members of the same clubs. *Weit I*, 467 F.Supp. at 206-07. Kenneth Zweiner, chairman of Harris, and Tilden Cummings, of Continental, worked together for 20 years as trustees of Northwestern University.[7] David Kennedy, chairman of Continental, and Frank Bauder, president of Central, knew each other "very well" because Bauder had worked with Kennedy at Continental.[8] James R. Kennedy, who ran the Town and Country Charge Card Program at Continental,[9] became American's second vice-president in charge of the bank's charge card operations, which he designed, instituted and managed.[10] Thus, the very nature of the Chicago banking community facilitated the exchange of pricing information. *Gainesville Utilities Dep't* v. *Florida Power & Light Co.*, 573 F.2d 292, 303 (5th Cir.), *cert. denied*, 439 U.S. 966, 99 S.Ct. 454, 58 L.Ed.2d 424 (1978). Given this situation, defendants' conduct should be carefully scrutinized for evidence of conspiratorial behavior. *Id.*

Illinois had no credit card interest law in 1966. The Illinois usury statute in effect at that time, however, prohibited interest rates in excess of a 7% add-on per annum, (which Harris counsel said would proximate 14% annually), Ill.Ann.Stat. ch. 74, § 4 (Smith-Hurd 1966), and defendant Harris, a state bank, assumed that it would be bound by this statute. *See* Plaintiffs' Ex. 1, quoted in *Weit I*, 467 F.Supp.

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[5] Ill.Ann.Stat. ch. 16½, § 106 (Smith-Hurd Supp.1980).

[6] Shull Aff. at 3.

[7] Deposition of Kenneth V. Zweiner at 17.

[8] Deposition of David M. Kennedy at 64-65.

[9] Deposition of James R. Kennedy at 357.

[10] Deposition of Arthur Stump at 40, 76-77.

at 200. The federal statute governing the nationally chartered banks (defendants Continental and Central, and First) provided that they could charge interest at the rate allowed by the laws of the state in which the bank is located. 12 U.S.C. § 85 (1976). In determining what state law it was bound by, defendant Continental looked to the Illinois Consumer Finance Act, Ill.Ann.Stat. ch. 74, § 19 *et seq.* (Smith-Hurd 1966), which applied to small consumer loans and allowed an interest rate of 3% per month on loans up to $150.00, or 36% per annum, 2% per month or 24% per annum on the balance of the loans exceeding $150 and not exceeding $300, and 1% per month, or 12% per annum, on any part of the unpaid balance exceeding $300. *Id.* at § 31. Continental interpreted this Act as allowing a 1½% per month, or 18% per annum maximum overall effective rate. *Weit I,* 467 F.Supp. at 201. Without attempting to resolve these seemingly conflicting positions, I assume throughout this opinion that the limitations on the two types of banks differed as the parties thought.

Defendant banks began discussing the idea of a joint charge card in 1966 so as to prevent competition from outsiders and to prevent any one Chicago bank from taking the lead in the new charge card market. Continental was afraid that outsiders would enter the market, resulting in chaos.[11] Continental believed that First's motive in proposing a joint system was to prevent Continental from getting a head start.[12] At the same time, Continental didn't

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[11] A memorandum by Thomas G. Patterson to John B. Tingleff, both Continental officers, stated "[Valley National Bank, Phoenix] believes that if anyone goes in Chicago others will and this may result in chaos in the market. Could be [disastrous]." *Weit I,* 467 F.Supp. at 200.

[12] Plaintiffs' Ex. 6: Feasibility Study—Continental Illinois Nat'l Bank & Trust Co., dated July 1966, at 45-46.

want First, Harris and Central to start a charge card system "while we were sitting over there without a charge card." [13] High start-up costs and large initial losses were projected, *Weit I*, 467 F.Supp. at 201, so defendants were anxious to avoid an outbreak of competition. Gaylord Freeman, president and later chairman of First testified ". . . since nobody had a viable credit card [in 1966] and it was all new and if one of the others had aggressively merchandised the card at a lower cardholder interest rate, I think [First] would have to go too, at the lower rate, too." *Id.* at 207.

In the spring of 1966, then, when the subject of bank credit cards was ". . . in the air,"[14] First hosted a meeting attended by representatives of Continental, Harris and Northern Trust[15] to discuss the feasibility of a credit card program. The notes of this meeting, held on May 22, 1966, summarize a discussion about the maximum legal interest rate:

> Lewis [of Harris, a state bank] commented that the maximum must be no more than the equivalent of 7% add-on per annum, or less than 14%. Foote [of Harris], who said he had looked into credit cards on his own for Harris some months ago, found specific revolving credit enabling legislation in other states where 1½% per month is in effect. Wood [of First] commented that this is troubling First's lawyers, too.

Plaintiffs' Ex. 1, quoted in *Weit I*, 467 F.Supp. at 200. Representatives of the four banks met again on May 26,

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[13] Deposition of Sheldon Swope, Vice-President of Continental, at 45.

[14] Deposition of Allen Stults, president of American, at 24-25.

[15] Northern participated in the original planning sessions, but dropped out of the program in August, 1966. *Weit I, supra* at 200, n. 4.

1966. The minutes of this meeting state that "Wood [of First] said the First's lawyers had two legal questions—rate and anti-trust—and the anti-trust seemed to be the easier of the two." *Id.* The group began meeting regularly after this. American was not a formal participant, but sent a representative. Central, a correspondent bank of both Harris and Continental, did not participate in these early meetings, but received status reports on the formation of a compatible system.[16] Pullman, a correspondent of First, Continental and Harris, did not attend the group meetings either, as it was planning to issue its own bank credit card. Pullman received mailings about the compatible system, however, and in June, a Continental officer called a Pullman officer to tell him about a pending Continental press release on the joint system. *Weit II*, 478 F.Supp. at 289.

During these early meetings, the group determined that card design, imprints and forms would be uniform, and that a participating merchant directory, a list of cancelled or stolen cards, and a merchant instruction booklet would be jointly issued. *Weit I, supra* at 200. They also agreed that their correspondent banks could retain their relationship with local merchants in return for soliciting card holders. *Id.* at 203. Without this latter agreement, the four banks would have solicited correspondents customers directly, provoking the correspondents into forming their own bank credit card systems, thereby diluting the market. *Id.*

In late June, 1966, officers of First, Continental, Harris and Northern flew to San Francisco to consult with the Wells Fargo Bank about the Western States Bank Card Association.[17] The next day, these officers met with the

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[16] Deposition of Frank Bauder at 37; Defendants' Ex. D9 and D11.

[17] Plaintiffs' Ex. 93 and 140.

president of Bank Americard Service Corporation to discuss Bank Americard's revenues and expenses, including the "regular 1½% per month" interest charge.[18]

In July, 1966, the four banks retained Information Sciences Associates, a consulting firm with experience in the formation of charge card systems. *Id.* at 200. Later that month, Continental personnel received a memorandum dated July 25, 1966 from Miles G. Seeley, senior partner of Mayer, Brown & Platt, counsel for Continental, limiting discussions with other banks to the subject of planning a compatible card system and specifically forbidding any "discussion (even in jest)" of ". . . [f]ees, discounts, billing and extended credit terms or any other economic terms of the relationship between any bank and its own credit cardholders."[19] The four banks employed Mayer, Brown & Platt to advise them on antitrust matters, and the Seeley memorandum was distributed to other defendant banks. From this point on, counsel monitored the meetings of defendants' "study group" to ensure anti-trust compliance.[20]

During this time, defendant Pullman was going ahead with plans to issue its own charge card. Pullman intended to announce its card, which was to have an interest rate of 18% per annum, on August 12, 1966, and the program was to begin on November 7, 1966. *Weit II*, 478 F.Supp. at 288-90. The other banks knew about Pullman's plans. A description of the Pullman credit card program, including the cardholder interest rate, appeared in the feasibility study

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[18] Memorandum of Robert K. Miller to John Tingleff, dated July 14, 1966, Ex. A to Defendant Continental's Answers to Plaintiffs' Interrogatories, filed November 11, 1977 at pp. 23-24.

[19] Prater Deposition, Ex. 50; Kranzley Deposition, Ex. 8E.

[20] Deposition of John Mattmiller (Northern), at 39-42.

prepared by Continental in July, 1966,[21] and on August 5, 1966, at a meeting of the Continental Advisory Committee, Alfred Lindgren of Continental reported "that the Pullman Bank has changed their package, and are now offering basically what we are proposing."[22] The night before Pullman's scheduled announcement, three Continental officers had dinner with Donald O'Toole, president of Pullman, and tried to talk him into delaying Pullman's start-up date. *Id.* at 289. O'Toole refused Continental, Harris and First then decided to advance their start-up dates to early November.[23]

On September 8, 1966, Continental announced its plans for an all purpose charge card.[24] Harris announced its entry into the charge card business the next day[25] and First made its announcement the following week.[26] All three banks stated that they would be part of a compatible charge card system, and that they would issue their cards in November. None of the announcements mentioned interest rates to be charged future cardholders. At the same time, Northern announced it was dropping out of the program.[27]

Continental, Harris and First continued to inform Pullman of their plans. Finally, in the fall of 1966, Pullman joined the group. *Id.* at 289-90. Mr. Murphy, a Pullman officer who became president of Midwest in 1967, testified that Pullman joined Midwest "[b]ecause we were concerned . . . that we were going to have competing bank card systems . . . . And also, that we were a failure." *Id.*

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[21] Plaintiffs' Ex. 6 at 43.

[22] Lindgren Deposition, Ex. 2.

[23] Defendants' Ex. A6, Prater Deposition, Ex. 55 and 56.

[24] Defendants' Ex. A6.

[25] Prater Deposition, Ex. 55.

[26] Prater Deposition, Ex. 56.

[27] Prater Deposition, Ex. 55.

Central decided to join the group at this time as well. Although it had not participated in or sent a representative to the formal study group meetings, a Central vice-president had attended a presentation on interbank charge card transfers held in late August. *Id.* at 288. Central also knew of Pullman's plans. *Id.* Central officers assumed they would charge the maximum legal interest rate, which their counsel had advised was 18% per annum, or 1½% per month. *Id.*

On October 24, 1966, First, Continental, Harris, Central and Pullman signed the "interim agreement" establishing the Midwest charge card system. *Weit I,* 467 F.Supp. at 202. The agreement mandated certain requirements for all membership banks: uniform floor limits; uniform cash advance limits; uniform merchandising return procedures; uniform advertising limitations; uniform transaction reporting procedures; and uniform card format and design. *Id.* It did not mention charge card holder interest rates. By this time, however, each defendant, with the exception of American[28] was planning on charging its cardholders an interest rate of 18% per annum, or 1½% per month. Continental, which thought it was bound by the Illinois Consumer Finance Act, could have charged an interest rate of 36% per annum for the first $150, 24% on the next $150, and 12% on the remaining balance above $300,[29] but settled on an interest rate of 18% per annum, as did Central, which decided 18% was the maximum allowed by law. *Weit II,* 478 F.Supp. at 288. Harris, which assumed it was limited by the Illinois usury law[30] to charging a 7% add-on, or less than 14% annually, *Weit I,* 467 F.Supp. at 200, arrived at the 18% interest rate

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[28] American did not join Midwest until 1969, although a representative of American attended the group meetings. *Weit I,* 467 F.Supp. at 202.

[29] Ill.Ann.Stat. ch. 74, § 31 (Smith-Hurd) 1966).

[30] Ill.Ann.Stat. ch. 74, § 4 (Smith-Hurd, 1966).

by charging 1% interest and ½% "service charge" per month.[31] Pullman was also charging an interest rate of 18%.

When the Illinois General Assembly convened in 1967, the Midwest group hired William Dillion, a lawyer and professional lobbyist, to lobby for a credit card interest bill and represent the banks before the Illinois legislature.[32] An early draft of the Midwest bill set the maximum cardholder interest rate at 24%,[33] but later drafts settled on 18%.[34] Midwest paid Dillion for his efforts, even though Dillion thought the bill was unnecessary for the national banks.[35] The legislature passed the Midwest bill which went into effect on July 24, 1967,[36] eight months after the banks first issued their cards at the uniform rate of 18% per annum.

Although American had attended the Midwest organizational meetings in 1966, it did not get into the charge card business until 1968. It then hired James Kennedy, who ran the charge card program at Continental, to establish the program for American. *Weit I*, 467 F.Supp. at 204. American joined Midwest in the spring of 1969, charging the (by now) standard cardholder interest rate of 18% per annum. *Id.* Midwest joined the Interbank Card Association, Inc. (Master Charge) that year as well. *Id.* at 205. In 1970, First left the Midwest system, joined Bank Americard, and began soliciting the defendants' correspondent banks for the first time. *Id.*

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[31] Appellants' brief at 65, citing Plaintiffs' Ex. 105 and 733.

[32] Deposition of William Dillon at 13.

[33] Dillon Deposition, Ex. 19 and 15A.

[34] Dillon Deposition, Ex. 16A.

[35] Dillon Deposition at 210-11; Ex. 6 and 9.

[36] Ill.Ann.Stat. ch. 74, § 4.2 (Smith-Hurd Supp. 1980).

When plaintiffs first filed suit in 1970, defendants were still charging an interest rate of 18%, the same rate being charged today.

Defendants, in their motion for summary judgment, introduced affidavits by and depositions of their officers denying the existence of an agreement and giving business reasons for arriving at the 18% per annum charge card holder interest rates David M. Kennedy, chairman of the Board of Directors, for Continental, stated that during the summer of 1966, he determined that Continental's charge card should carry the highest interest rate legally permissible so as to make the system, for which Continental projected early high losses, profitable as soon as possible. *Weit I*, 467 F.Supp. at 201. Harris Bank's senior vice-president, Carroll E. Prater, also testified that Harris decided to charge the maximum legal rate because "it was an expensive business to get into . . . losses were very high." *Id.*

Pullman officers stated that they arrived at an interest rate of 1½% per month based on their prior experience in the charge card business. *Weit II*, 478 F.Supp. at 289. Even at that rate, they did not expect the charge card program to be profitable for several years. *Id.* Frank Bauder, chairman of Central, testified that by the time Central decided to join Midwest in September of 1966, the 1½% per month interest rate was taken for granted as necessary to cover costs. *Id.* at 288. James Kennedy, American's second vice-president in charge of the bank's charge card operations, gave similar reasons for American's decision to charge 1½% per month. *Weit I*, 467 F.Supp. at 204.

Defendants also argued that it was public knowledge that Bank Americard and other retail and oil credit cards were charging an interest rate of 1½% per month or 18%

per annum. Finally, they relied on written memorandum from their lawyers forbidding the discussion of interest rates as evidence that they did not agree on the uniform interest rate.

B.

Under Rule 56(e) defendants' denials were sufficient to shift the burden to plaintiffs to produce some significant probative evidence tending to support their complaint. *First National Bank of Arizona* v. *Cities Service*, 391 U.S. 253, 289-90, 88 S.Ct. 1575, 1592-1593, 20 L.Ed.2d 569 (1968). The critical question then becomes whether plaintiffs presented enough evidence so that a rational trier of facts could find that this uniform interest rate resulted from an agreement among and between defendants rather than from independent identical decisions by individual bankers. *See Ambook Enterprises* v. *Time, Inc.*, 612 F.2d 604, 613 (2d Cir. 1979), *cert. dismissed*, —— U.S. ——, 101 S.Ct. 35, 65 L.Ed.2d 1179 (1980). In order to infer such an agreement, there must be more than merely parallel business conduct. *See Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 541, 74 S.Ct. 257, 259, 98 L.Ed. 273 (1954). I think that plaintiffs did present evidence of more than merely parallel conduct, from which a jury could rationally conclude that defendants Continental, Harris, Pullman and Central agreed on uniform interest rates.

First of all, plaintiffs produced evidence showing that defendants Continental, Harris and Pullman knew the interest rates being contemplated by each. At the very first formal meeting of the group, which representatives of Continental and Harris attended, Harris officers stated they were afraid they may be bound by the Illinois usury limits, but that other states had enabling legislation allowing an interest rate of 1½% per month. From this statement it

can be inferred that Harris hoped to charge 1½% per month. Then, in late June, 1966, officers of defendants Continental and Harris, along with representatives of First and Northern, met with the president of Bank Americard and discussed what Continental officers termed the "*regular* 1½% per month interest charge." (Emphasis added.) From this statement it can be inferred that Continental was planning on charging 1½% per month interest.[37] Because Continental knew in July, 1966, that Pullman was going to charge its cardholders an interest rate of 1½% per month or 18% per annum, it can be inferred that Pullman told Continental as much.

This exchange of information regarding the "regular" interest rate and the interest rate being charged by Pullman is analogous to "[a] knowing wink [which] can mean more than words" in determining whether defendants agreed to fix prices. *Esco Corp.* v. *United States*, 340 F.2d 1000, 1007 (9th Cir. 1965). In *Esco*, the court held that an exchange of price information at a meeting called by Esco Corporation's largest competitor was sufficient evidence, when combined with price uniformity, for inferring a price fixing conspiracy:

> [S]uppose five competitors meet on several occasions, discuss their problems, and one finally states—"I won't fix prices with any of you, but here is what I am going to do—put the price of my gidget at X dollars; now you all do what you want." He then leaves the meeting. Competitor number two says—"I don't care whether number one does what he says he's going to do or not,

[37] It can also be inferred from this statement that Continental was saying "this is the only rate a bank should charge." It is interesting to note that Continental referred to 18% as the "regular" interest rate several months before it consulted with Robert Bloom, Chief Counsel to the Illinois Comptroller of the Currency. The United States Treasury, regarding its interpretation of the Illinois Consumer Finance Act, *Weit I*, 467 F.Supp. at 201.

> nor do I care what the rest of you do, but I am going to price by gidget at X dollars." Number three makes a similar statement— "My price is X dollars." Number four says not a word. All leave and fix "their" prices at "X" dollars.
>
> We do not say the foregoing illustration *compels* an inference in this case that the competitors' conduct constituted a price-fixing conspiracy, *including an agreement to so conspire,* but neither can we say, as a matter of law, that an inference of no agreement is compelled .... [I]t remains a question for the trier of fact....

Id.

Here, defendants Continental and Harris said they wouldn't fix prices,[38] yet in discussions between the two banks, representatives of Harris spoke of 1½% enabling legislation and Continental officers referred to "regular 1½%" interest rates. In the same way, Pullman told Continental what it was going to charge. The Supreme Court has held that an exchange of price information, in an industry dominated by relatively few sellers, is itself a violation of section 1 of the Sherman Act because "[p]rice is too critical, too sensitive a control to allow it to be used even in an informal manner to restrain competition." *United States* v. *Container Corp. of America,* 393 U.S. 333, 338, 89 S.Ct. 510, 513, 21 L.Ed.2d 526 (1969). If the Supreme Court could find that the exchange of price information was sufficient for inferring a price-fixing agreement, surely we should consider it as some evidence, when combined with subsequent parallel pricing, joint action, product uniformity and motive from which an agreement could be inferred.[39]

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[38] Continental circulated the Seeley memorandum forbidding the discussion of interest rates to other Midwest banks, including Harris. *See* nn. 19 and 20, and accompanying text, *supra.*

[39] Defendants argue that it was common knowledge that 1½% per month was the "regular" interest rate. This does not prevent them from agreeing to charge that rate, however.

Plaintiffs introduced no evidence indicating that defendant Central exchanged any interest rate information with defendants Continental, Harris and Pullman. Yet when Central joined Midwest in the fall of 1966, it charged the same interest rate as discussed by the other defendants, even though it could have charged the higher rate allowed to National banks. It is not necessary for each defendant to have participated in every act of the conspiracy in order to be charged with such, as long as they had a common purpose connecting their acts. *See Esco Corp.* v. *United States, supra,* 340 F.2d at 1006. Here, Central participated in other activities from which its participation in the conspiracy can be inferred.

The district court judge did not consider the joint lobbying activities by defendants Continental, Harris, Central and Pullman,[40] stating that the prejudice of this evidence outweighed its probative value. *Weit I,* 467 F.Supp. at 207-08 n. 22. The majority adopts this holding, but I respectfully disagree. Federal Rule of Evidence 403 is meant to exclude evidence which tends to horrify, evoke sympathy or increase a desire to punish due to prior bad acts, and whose probative value is slight. 10 *Moore's Federal Practice* § 403.10[1], at IV-75 (2d Ed. 1979). Defendants' lobbying activities do not fall into any of these categories.

While defendants' united support of the 18% per annum interest rate is not in itself illegal under *Eastern Railroads Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961),[41] it is certainly

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[40] These four defendants were Midwest members when Midwest hired William Dillon.

[41] Plaintiffs did not allege that this activity in and of itself constituted an illegal conspiracy. Rather, they introduced it as evidence of the alleged agreement between defendant banks to fix the interest rate of 18%. This evidence thus falls within an exception to the

probative of an existing agreement to fix interest rates at that level. The inference is very readily drawn that defendants could not have worked together on the same bill, at a time when a number of different interest rates could have been agreed to, and when defendants had differing understandings regarding the legal restrictions on their interest rates, without implicitly agreeing that 18% was the rate they thought best and would therefore charge. Indeed, this is the rate they were each charging when they agreed to support a credit card interest bill. The Supreme Court has held that such a concerted effort, when defendants conformed to the arrangement, is probative of a price fixing conspiracy. *See United States* v. *Paramount Pictures,* 334 U.S. 131, 142, 68 S.Ct. 915, 921, 92 L.Ed. 1260 (1948). Thus, defendants' joint lobbying activities should be considered as further evidence of an implicit agreement to charge 18% interest rate per year.

Another factor contributing to the evidence from which an agreement to fix interest rates may rationally be inferred is defendants' express agreement to standardize everything about their charge cards other than marketing strategy and interest rates. Defendants admitted that "[h]omogeneity was legislated into the product by edict. In fact, this identity is the philosophic heart and soul of the compatible agreement each bank must sign to gain admission into the system."[42] Plaintiffs' expert witness testified

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Noerr rule being the "established rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny." *United Mine Workers of America* v. *Pennington,* 381 U.S. 657, 670 n.3, 85 S.Ct. 1585, 1593, n.3, 14 L.Ed.2d 626 (1965).

[42] Egan Deposition, Ex. 16 at 99.

that these uniform requirements were no more essential to the compatibility of the charge card system and the interchange of sales slips than they are to the interchange of checks.[43]

In a competitive industry, such standardization could perhaps enhance price competition. L. Sullivan, *Antitrust* § 98 at 276 (1977). But in an oligopoly, and plaintiffs have shown that the Chicago banking industry may be fairly characterized as such, non-price competition is valuable, and anything tending to standardize non-price terms harms competition. *Id.*, § 99 at 279. The Ninth Circuit recognized this harm in *C-O-Two Fire Equipment Co.* v. *United States*, 197 F.2d 489 (9th Cir. 1952), when it stated that product standardization of a product that is not naturally standardized facilitates the maintenance of price uniformity. *Id.* at 493. Thus, product standardization was another factor, in addition to parallel conduct, from which a conspiracy to fix could be inferred. *Id.*

Here, under competitive conditions, credit card characteristics would have changed as independent banks experimented with one or another promotional features and cardholders and merchants gave their business to the banks offering the most attractive combination.[44] Instead, defendants Continental, Harris, Central and Pullman each signed an agreement, on the same day, which artificially homogenized their product and eliminated an area of potential competition. Their defense that such standardization was needed to eliminate chaos among the merchants and public, see *Weit I*, 467 F.Supp. at 211, should not be definitive of the issue, as industry self-regulation should be viewed with suspicion. *See United States* v. *Socony-Vacuum*

[43] Shull Aff. at 5.

[44] Shull Aff. at 6.

Oil Co., 310 U.S. 150, 220-22, 60 S.Ct. 811, 842-843, 84 L.Ed. 1129 (1940).

Plaintiffs also introduced evidence of defendants' opportunity to conspire. Aside from the formal study group meetings, which representatives of Continental, Harris and American attended, and of which Central and Pullman were kept informed, defendants' officers met informally on numerous occasions. Opportunity to conspire, standing alone, is insufficient for inferring a conspiracy. It may be considered, however, in determining whether all of the evidence, in addition to parallel behavior, warrants an inference of common, rather than individual conduct. L. Sullivan, *Antitrust*, § 110 at 317 (1977). Evidence of meetings between defendants, presenting an opportunity to conspire, were plus factors in finding a price-fixing agreement in *C-O-Two Fire Equipment Co.* v. *United States*, even though there was no evidence of what was discussed. *C-O-Two Fire Equipment Co. supra*, 197 F.2d at 493.[45] And in *Esco Corp.* v. *United States*, 340 F.2d 1000 (9th Cir. 1965), the court affirmed a jury finding of price-fixing based on evidence that defendants were at two meetings during which the elements necessary to price fixing were discussed, although there was

[45] The district court distniguished *C-O-Two* from the present case by saying that a finding of conspiracy was warranted in light of other factors: identical bids, unnecessary product standardization, illegal licensing contracts, dealer policing, and identical price increases at times of surplus, coupled with the fact that the defendants offered no rebuttal evidence. *Weit I*, 467 F.Supp. at 214. Admittedly, plaintiffs in this case have not made as strong a showing of conspiracy as did the government in *C-O-Two*. But this case is not a challenge to the legal sufficiency of the evidence for a criminal conviction. All that is necessary to withstand a motion for summary judgment, which is the only issue at this point, is a showing of at least one other factor, in addition to parallel pricing, from which a jury could infer an agreement. L. Sullivan, *Antitrust* § 110, at 317 (1977). Plaintiffs have shown at least three such factors, and their opportunity evidence merely contributes to the overall picture.

no evidence of an agreement other than parallel behavior. The court stated:

> As in so many other instances, it remains a question for the trier of fact to consider and determine what inference appeals to it (the jury) as most logical and persuasive, after it has heard all the evidence as to what these competitors had done before such meeting, and what actions they took thereafter, or what actions they did not take.

Id. at 1007.

Defendants denied any discussion of interest rates at these formal and informal meetings. But the fact of their meetings, combined with their knowledge of the interest rates to be charged by fellow defendants, their decision to lobby together in the legislature for an 18% rate and their express agreement on non-interest aspects of their parallel conduct, provide sufficient evidence from which a jury could infer that interest rates were in fact discussed. The jury should have the opportunity to decide for itself that defendants' denials are more credible than plaintiffs' circumstantial evidence of an agreement.

Finally, plaintiffs introduced evidence of defendants' motive to conspire. It was plaintiffs' inability to show a motive to agree and benefits obtained through the agreement which led the Supreme Court to affirm a summary judgment for defendants in *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 287, 88 S.Ct. 1575, 1591, 20 L.Ed.2d 569 (1968). In the present case, defendants admitted the motive for doing exactly what they are accused of: defendant officers testified that they were afraid of aggressive competition in the new market for credit cards, which they thought would result in chaos. If someone entered the market at a lower rate, which Harris thought it may have been forced to do, given the state usury laws,

the other defendants may have marketed their cards at a lower rate as well. None of the banks wanted to face this possibility as they were afraid of large losses in starting the new program.[46]

Defendants introduced independent business reasons to explain their decisions to charge an 18% per annum interest rate. It is up to the jury, however, and not the trial judge, to decide which explanation for defendants' action is more reasonable. *See Continental Baking Co.* v. *United States*, 281 F.2d 137, 143-46 (6th Cir. 1960).[47] Furthermore, the legitimate business reasons which defendants suggest motivated their actions do not defeat the possibility that defendants acted collusively. *Reading Industries, Inc.* v. *Kennecott Copper Co.*, 1979-2 Trade Cases ¶ 62,906 at 79,215 (S.D. N.Y. 1979). The Supreme Court has stated: "[t]his evidence [of business judgment], together with other testimony of any explanatory nature, raised fact

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[46] At the same time, defendant Continental, which thought it was bound by the Illinois Consumer Finance Act, gave up the opportunity to charge a higher interest rate—36% per annum on balances up to $150—which would have enabled it to recoup its projected losses much more quickly. Such an apparent contradiction in self interest "strengthens considerably the inference of conspiracy." *Milgram* v. *Loews, Inc.*, 192 F.2d 579, 583 (3rd Cir. 1951).

[47] In *Continental*, the government charged Continental with participating in a price fixing conspiracy and introduced evidence showing that defendants met prior to each price increase. As in *Weit I*, the government did not introduce any evidence of a specific agreement. The trial judge decided for himself that there was an agreement, and consequently refused defendants the opportunity to present evidence of economic factors leading to these price increases. The Sixth Circuit reversed, stating that it was up to the jury to determine whether an agreement existed, based on all the evidence. *Id.* at 143. *Weit I* is analogous, in that here, the trial judge decided for himself that defendants' explanations were more reasonable than plaintiffs and that there was no agreement.

issues requiring the trial judge to submit the issue of conspiracy to the jury." *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 542, 74 S.Ct. 257, 260, 98 L.Ed. 273 (1954). In *Theatre Enterprises*, as in *Weit I*, defendants had denied any agreement and had introduced evidence of local conditions, attributing their uniform action to individual business judgment. The Supreme Court went on to affirm the jury verdict for defendants, over plaintiff's argument that the district court should have directed a verdict, but it was the jury, and not the court making the ultimate decision. When defendants' credibility is at issue, as it was in *Theatre Enterprises* and is in *Weit I*, directed verdicts and summary judgments "should be used sparingly," because "[i]t is only when the witnesses are present and subject to cross examination that their credibility and the weight to be given their testimony can be appraised." *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962).[48] In the present case, the district judge overstepped his proper role by determining for himself that defendants' explanations were more credible than plaintiffs' explanation

[48] It is true that defendants' credibility in the present case is not at issue in the same way in which it was at issue in *Poller*. There, the issue was defendants' intent, as their actions in cancelling plaintiffs affiliation contract and then buying its equipment would have been legal unless done with an intent to monopolize. CBS, in its motion for summary judgment, presented "substantial evidence tending to show the nonexistence of conspiratorial behavior." *Cities Service, supra*, 391 U.S. 253, 285, 88 S.Ct. 1575, 1590, 20 L.Ed.2d 569 (discussing the difference between *Poller* and *Cities Service*). Nonetheless, the Court held that the denials of unlawful intent by "interested parties," *Poller, supra*, 368 U.S. at 468, 82 S.Ct. at 488, were insufficient to rebut plaintiff's allegations of conspiracy for purposes of granting a summary judgment. *Id.* at 473, 82 S.Ct. at 491.

of the evidence. His entry of summary judgment for defendants was therefore improper.

Defendants emphasize that they were warned at an early stage of potential anti-trust violations and that their lawyers monitored the study group meetings to ensure compliance. This information should not be dispositive of defendants' evidence. First of all, there is no evidence that the warning was given before defendants started discussing charge card programs on a regular basis. To the contrary, the evidence shows that the warning wasn't given until July 25, 1966, almost two months after defendants began meeting formally, and one month after 18%—or 1½% per month—had become "the regular interest rate." Secondly, lawyers were not present every time defendants met: no lawyer was with the officers of Harris and Continental on their cross-country trip to meet with the president of Bank Americard to discuss "the regular" interest rate, nor was a lawyer present when officers of Continental had dinner with the president of Pullman.

Most importantly, these defendants and future sophisticated defendants should not be allowed to escape allegations of illegal conspiracies as easily as by leaving a paper trail drafted by their lawyers. No conspirator today is going to publicly agree to joint action, nor are they going to leave a written record of their agreement. Instead, conspirators are likely to go to great pains to conceal their agreement, and a lawyer's memorandum would accomplish just this.[49] That defendants were warned by their lawyers and were aware of possible anti-trust violations should not be completely disregarded. Rather, defendants' statements that

[49] I am not implying that defendants' lawyers participated in a cover-up. Defendants could easily have discussed forbidden subjects in their informal meetings, however, while scrupulously obeying their lawyers during formal sessions.

they carefully obeyed their lawyers' warnings should be evaluated by the trier of fact along with plaintiffs' evidence of an agreement.

In sum, plaintiffs have rebutted Continental's, Harris', Pullman's and Central's denials with evidence of more than the merely conscious parallelism held insufficient to withstand a summary judgment in *Cities Service, supra,* 391 U.S. at 290, 88 S.Ct. at 1593. They produced evidence that Continental, Harris and Pullman communicated directly regarding the interest rates each was going to charge; Continental, Harris, Pullman and Central took joint action on legislation regarding legal interest rates and on most other aspects of the charge card system; and that all four banks had a motive to agree to fix interest rates. All of these factors have been held sufficient, when combined with a showing of parallel behavior to withstand motions for summary judgment. *See De Jong Packing Co.* v. *United States,* 618 F.2d 1329, 1334 (9th Cir.), *cert. denied,* ____ U.S. ____, 101 S.Ct. 783, 66 L.Ed.2d 603 (1980); L. Sullivan, *Antitrust* § 110 at 316 (1977). Plaintiffs, having presented evidence from which an agreement to fix prices may rationally be inferred, should be given a chance to present their case against these four defendants to a jury.

On the other hand, plaintiffs presented significantly less evidence regarding defendant American's participation in the horizontal conspiracy. American did sent a representative to the formal group meetings, but there is little other evidence that it met with the other defendants on a formal or informal basis. It did not participate in drawing up the formal agreement, nor did it sign the agreement with the other defendants. It did not participate in the lobbying activities with other defendants. Most important, it did not have the motive to conspire to set an 18% interest rate as did the other defendants. By the time American issued its

charge card, the 18% credit card interest rate legislation had been in effect for two years. Every other bank seemed firmly set in its pattern of charging an 18% interest rate. Thus, American did not have to worry about being undercut by its competitors, and was free to set the rate it felt would be best for recouping start-up costs and initial losses. Plaintiffs did not introduce sufficient evidence of American's role in the conspiracy and motive to conspire to overcome American's denial of price fixing.

III. THE VERTICAL CONSPIRACY

I agree with the majority's decision affirming the summary judgments granted defendants Continental, Harris and Central regarding the alleged vertical conspiracies with their respective correspondents. I also agree that if there were no horizontal conspiracy, plaintiffs would lack standing to assert a vertical conspiracy claim against defendant Pullman.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

April 13, 1981

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. WILLIAM J. CAMPBELL, Senior District Judge*

JACK WEIT, et al.,
Plaintiffs-Appellants,

Nos. 79-1077 & 2113

vs.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 70-C-1926

GEORGE N. LEIGHTON, *Judge.*

ORDER

On consideration of the petition for rehearing with suggestion for rehearing *en banc* filed in the above-entitled cause by counsel for the plaintiffs-appellants, a majority of the original panel** having voted to deny a rehearing, and no judge in regular active service having requested a vote on the *en banc* suggestion,

IT IS ORDERED, that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

** Circuit Judge Walter J. Cummings did not participate in the *en banc* consideration.

APPENDIX B

Jack WEIT, James B. Cox and Robert W. McLallen, on behalf of themselves and all others similarly situated, Plaintiffs,

v.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, a corporation, Harris Trust and Savings Bank, a corporation, Pullman Bank and Trust Company, a corporation, Central National Bank in Chicago, a corporation, American National Bank and Trust Company of Chicago, a corporation, all other Illinois banks similarly situated, and Midwest Bank Card System, Inc., a corporation, Defendants.

No. 70C1926.

United States District Court,
N. D. Illinois, E. D.

Dec. 22, 1978.

Class action was brought by bank charge cardholders alleging that five banks conspired to fix rate of interest charged for extended payment privileges on credit card purchases. On three defendants' motions for summary judgment, the District Court, Leighton, J., held that: (1) cardholders failed to rebut banks' showing that complained of conduct, the fixing of interest rate at 1.5% per month, was the product of independent business decisions rather than conspiracy and thus failed to demonstrate horizontal conspiracy, and (2) cardholders failed to show vertical conspiracy between one bank and its correspondents with respect to interest charged.

Motions granted.

1. Federal Civil Procedure—2543, 2544

On motion for summary judgment, moving party must sustain burden of showing absence of any genuine issue

of fact, and all evidence and inferences therefrom must be construed in light most favorable to opposing party. Fed.Rules Civ.Proc. rule 56, 28 U.S.C.A.

2. Federal Civil Procedure—2484

Particularly in antitrust suits, remedy of summary judgment should be sparingly used since evidence is likely to be complicated and extensive. Fed.Rules Civ.Proc. rule 56, 28 U.S.C.A.

3. Federal Civil Procedure—2544

Once moving party has met burden imposed by rule and has demonstrated that facts on which opposing party relies are not susceptible of interpretation sought to be given them, opposing party must show existence of significant probative evidence supporting inference urged or face summary judgment dismissing complaint. Fed.Rules Civ. Proc. rule 56, 28 U.S.C.A.

4. Federal Civil Procedure—2487

Where case had been pending for eight years, during which time plaintiff bank charge cardholders had conducted substantially unlimited discovery, summary judgment could not be denied because of incompleteness or inconclusiveness of factual record, or because of substantial credibility issues. Fed.Rules Civ.Proc. rule 56, 28 U.S.C.A.

5. Federal Civil Procedure—2470.1

Possibility of discrediting opponent's denials at trial does not present issue of material fact that will defeat summary judgment. Fed.Rules Civ.Proc. rule 56, 28 U.S.C.A.

6. Monopolies—28(7.5)

Parallel business behavior is insufficient by itself to show conspiracy that violates the Sherman Act. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

7. Monopolies—28(7.5)

While proof of parallel business activity does not in itself establish a Sherman Act violation, it is circumstantial evidence from which an agreement may be inferred but such evidence standing alone is insufficient unless circumstances under which it occurred makes inference of rational, independent choice less attractive than that of concerted action. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

8. Monopolies—12(1.14), 28(7.5)

In determining whether inference of concerted action prohibited by the Sherman Act is warranted, question is whether evidence taken as a whole warrants inference of jont, consensual conduct rather than independent, individual action; moreover, inferences drawn from circumstantial evidence must be logical and reasonable, not based on speculation or conjecture. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

9. Monopolies—28(7.5)

Where uncontradicted testimony of every bank employee consistently denied that interest rates were discussed among alleged coconspirators, or that interest rates were consensually determined, and each bank faced identical problems of fraud, credit losses, and large initial expense to which reasonable businessmen would react in the same fashion, banks' universal adoption of identical cardholder interest rates did not provide basis for inference of Sherman Act horizontal conspiracy to fix rate of interest charged for extended payment privileges on bank credit card purchases. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

10. Monopolies—28(7.5)

Where banks were aware of potential antitrust problems and hence were careful not to discuss ratesetting or con-

duct joint market research, banks offered sworn, credible denials of existence of conspiracy and years of discovery by bank charge cardholders had uncovered no affirmative evidence of conspiracy, interest rate each bank charged was mandated by their individual needs, and uniformity of card format, imprinter, sales slip and merchant regulations was necessary for operation of compatible card system, parallel fixing of rate of interest charged for extended payment privileges on bank credit card purchases did not show horizontal conspiracy but rather was product of independent business decisions. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

11. Monopolies—28(7.5)

Fact that card-issuing competition did not develop between bank and its correspondents was insufficient to raise inference of vertical conspiracy in connection with fixing of interest rate for extended payment privileges on bank credit card purchases in light of bank's affidavit and documentary evidence denying existence of conspiracy. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

12. Monopolies—28(7.5)

Where bank had right to determine interest rate charged customers who received certain credit cards from various participating correspondents because bank and not correspondent extended credit to customers, bank unilaterally determined interest rate to be charged such cardholders, and distribution of interest rate information to participating correspondent banks never rose to exchange of views on the subject, fact that rate to be charged by participating correspondent banks was communicated to them by bank did not give rise to any inference of vertical conspiracy in connection with setting of interest charged for extended

payment privileges on credit card purchases. Sherman Anti-Trust Act §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

Herbert J. Bell, pro se.

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James E. Beckley, A Professional Corp., Chicago, Ill., for plaintiffs.

Francis A. Beninati, Chicago Ill., John P. Meyer, Danville, Ill. Jeffrey Jahns, Jon R. Waltz, Dennis C. Waldon, William T. Huyck, Roan & Grossman, William R. Warnock, Chicago, Ill. for plaintiffs.

Jerald P. Esrick, Max Wildman, Wildman, Harold, Allen & Dixon, Chicago, Ill., for Pullman Bank and Trust Co., a corporation.

Bryson P. Burnham, John D. Donlevy, Bertram M. Long Mayer, Brown & Platt, Chicago, Ill. for Continental Illinois Nat. Bank and Trust Co. of Chicago a corporation.

Winston & Strawn, Demetri J. Retson, Chicago, Ill for Central Nat. Bank in Chicago, a corporation.

Kirkland & Ellis, Carl S. Lloyd, Chicago, Ill., for American Nat. Bank and Trust Co. of Chicago, a corporation and all other Illinois banks similarly situated.

Christine H. Rosso, Chapman & Cutler, Keehn Landis, Chicago, Ill., for Harris Trust and Savings Bank, a corporation.

George W. Groble pro se.

Memorandum

LEIGHTON, District Judge.

This is a class action brought by three charge cardholders in the Midwest Bank Card System, Inc., and its successor, the Interbank-Master Charge Bank Card System, Inc., against five Chicago banks[1] for alleged violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1,2. The gist of the claim is that defendant conspired to fix the rate of interest charged for extended payment privileges on credit card purchases at 1.5% per month, or 18% annually. Counts I and II of the third amended complaint allege that defendants engaged in a horizonal conspiracy. Counts III and IV repeat the allegations of the first two counts and further allege several vertical conspiracies among defendants and their correspondent banks.[2] The class was certified on Counts I through IV by another judge of this court and consists of plaintiffs and all persons and business entities issued a bank credit card with a billing address in Illinois, which persons or business entities held an active Midwest Bank Card System, Inc. or Interbank-Master Charge, Inc. bank credit card account during the August, 1970 billing cycle, and who have incurred finance charges. *See Weit* v.

[1] Continental Illinois National Bank and Trust Company of Chicago, Harris Trust and Savings Bank, Pullman Bank and Trust Company, Central National Bank in Chicago, American National Bank and Trust Company of Chicago, and the Midwest Bank Card System, Inc. The Midwest Bank Card System, Inc. is a not-for-profit corporation established to administer the compatible bank charge card system under which the defendants issued their credit cards. It has never been served with process. A description of the system can be found in the Appendix.

[2] Counts V and VI have been disposed by grants of summary judgment in defendants' favor. Decisions, July 14, 1976 and December 27, 1976 (McMillen, J.).

Continental Illinois Nat. Bank & T. of Chicago, 60 F.R.D. 5 (N.D.Ill.1973).

Plaintiffs seek one hundred million dollars in damages before trebling and an injunction requiring renegotiation of cardholder interest rates on an individual basis. Their suit has been pending for more than eight years, during which time the parties have conducted thorough and far-ranging discovery. The cause is before the court on motions by defendants Continental, Harris, and American for summary judgment as to the charges of horizontal conspiracy alleged in Counts I through IV and a motion by Continental for sumary judgment as to the vertical conspiracy alleged in Counts III and IV. For the following reasons, the motions are granted.

I.

The historical facts, as drawn from the pleadings, depositions, affidavits, answers to interrogatories, and numerous documents produced in the course of discovery, are undisputed.

A. Formation of the Midwest Bank Card System

The idea of a regional, compatible bank charge card with a common identification mark, uniform sales slips, and a system for clearing or transferring them between banks, originated with First National Bank of Chicago[3] in late 1965. In early 1966, First hosted a meeting attended by representatives of Continental, Harris, and Northern Trust[4]

[3] First is named as a non-defendant co-conspirator in Counts I and III of the third amended complaint. Although First was a founding member of the Midwest Bank Card System, it left Midwest and joined BankAmericard, a competing combatible card system in January, 1970.

[4] Although Northern participated in the initial planning sessions, it dropped out of the program in August, 1966, prior to the formation of the Midwest Bank Card System, Inc.

to discuss the feasibility of a card program. The proposal was well-received; and in May, 1966, the group began to hold regular meetings in order to work out the details of the system. A representative of American attended these meetings as an observer. The minutes of the May 22, 1966 meeting, attended by representatives of First, Harris and Northern, summarize a discussion about the maximum legal interest rate:

> Lewis [of Harris] commented that the maximum must be no more than the equivalent of 7% add-on per annum or less than 14%. Foote [of Harris], who said he had looked into credit cards on his own for Harris some months ago, found specific revolving credit enabling legislation in other states where 1½% per month is in effect. Wood [of First] commented that this is troubling First's lawyers, too.

The minutes of the May 26, 1966 meeting, attended by representatives of the same three banks, state that "Wood [of First] said the First's lawyers had two legal questions—rate and antitrust—and the antitrust seemed to be the easier of the two."

At these early meetings, the group determined that card design, imprinter and forms could be uniform, and that a participating merchant directory, a list of cancelled or stolen cards, and a merchant instruction booklet could be jointly issued. However, on advice of counsel, it was agreed that advertising and market research, other than necessary system research, could not be done jointly. Defendants were aware of potential antitrust liability; and various documents indicate they knew interest rates were not to be discussed.

In July, 1966, for assistance in working out the program, the group retained Information Sciences Associates of Cherry Hill, New Jersey, a consulting firm with experience

in the formation of charge card systems. First, Continental, Harris and Northern consulted Wells Fargo Bank of California about the mechanics of its participation in the Western Bank Card Association. They also met with representatives of the BankAmericard Service Corporation concerning its operational procedures. In August, 1966, some group representatives met with officers of the Marine Midland Bank to discuss the possibility of creating a national bank charge card system. Members of the group also met several times in August with representatives of Pullman Bank and Trust Company[5] which was planning its own separate charge card program, Illinois Bank Charge.

Various internal bank memoranda express concern over the timing of introduction of the service. A Continental internal memorandum of August 11, 1966 states: "Three month lead over competitor would be advantageous. [Valley National Bank of Phoenix, Arizona] believe[s] that if anyone goes in Chicago, others will and this may result in chaos in the market. Could be disasterous [sic] . . . From the standpoint of competition, the longer Continental waits the less advantage it has. The more opportunity [other banks have] to study the program, the more opportunity there is for every bank in the city to become a full-fledged card issuer and merchant solicitor, which dilutes the market extensively." A Harris internal memorandum of December, 1966 likewise concluded that

> For many months, prior to last May, all of us had been reading of the increasing interest in bank credit card plans throughout the country and most of us concluded, I think, that it would be very difficult for any one bank in Chicago to successfully operate a broad credit card plan in our area because of our unit banking system. And, even if it tried, others would soon

[5] Pullman was a correspondent of First, Harris and Continental.

initiate similar and competitive plans resulting in a chaotic state of affairs as far as the public and the merchants were concerned. In May, therefore, representatives from the Continental, First National, Northern, and ourselves met for the first time to discuss the feasibility of devising a system that would enable any and all banks in the Chicago Metropolitan Area and in the State of Illinois to operate a charge card plan on a compatible and competitive basis.

Obviously such a system to insure prompt interchange of sales slips between banks had to include a uniform type credit card with a common identification mark or logogram, a uniform sales slip for merchant use, a standard type machine for functioning the sales slips, and finally the key to the whole compatible system—a method of clearing or transferring slips between banks.

The group originally planned to open membership to all Chicago area banks and each member bank was to be free to set its own terms on which it would do business with its cardholding customers and its merchants. Outlines of the system prepared for distribution to their correspondents by Continental and Harris in August, 1966 state:

It must be emphasized that nothing in this system is intended to restrict competition among banks with respect to any facet of the charge card business. It is apparent, however, that the mechanical problems involved in the presenting and paying of sales slips must be solved by the development of a uniform system for handling sales slips in order that the convenience of a charge card service can be made available to the largest possible segment of the people at the lowest possible cost.

During the summer, David M. Kennedy, Continental's chairman of the board of directors, determined that its Town and Country charge card should carry the highest interest rate legally permissible so as to make the system, for which Continental projected early high losses, profitable

as soon as possible. On October 3, 1966, before issuing the cards, Continental applied to the Comptroller of the Currency on its own behalf seeking confirmation of its interpretation of the Consumer Finance and Consumer Installment Loan Acts, Ill.Rev.Stat. ch. 74, §§ 19-46, 51-77 (1965), and Comptroller's Ruling No. 7310 which, taken together, suggested that a rate of 1.5% per month would be the maximum overall effective rate within the statutory allowance applicable to national banks. The reply of Robert Bloom, Chief Counsel of the Comptroller of the Currency, confirmed Continental's interpretation of Ruling No. 7310. All of Continental's officers and executives stated in their deposition testimony that interest rates were never discussed with representatives of other defendant banks; all said that the interest rate policy was independently formulated and implemented.

Similarly, Carroll E. Prater, Harris' senior vice-president, stated that Harris, too, determined to charge the maximum legal rate for extended payment privileges:

> [B]efore we had ever gotten into this business we knew something about the charge card business from having read many, many publications, having talked to other banks. We knew it was an expensive business to get into. We knew if you were going to break even, you had to bet [sic] the maximum that you could get because the startup costs were very high. The fraud losses. The credit losses were very high. And even at the maximum rate we were confident that there was [sic] going to be several years before you even broke even on this business.

Confidential internal reports prepared by Harris' Financial and Economic Research Department in August and September, 1966 projected substantial losses for the first few years of the program. Assuming an equal sharing of merchant discounts and receivables with its correspondents, Harris'

study projected early losses of $800,000.00 and predicted that cumulative profitability would not be reached until the sixth year of operations.

In autumn of 1966, Central National Bank[6] joined the group, apparently concluding that it could neither become a separate, independent card issuer because it lacked a sufficiently broad base in retail and merchant customers nor afford not to offer such a customer service because of potential customer loss. Pullman also joined the group. On October 24, 1966 First, Continental, Harris, Central and Pullman executed an interim agreement establishing the Midwest Bank Card System, Inc. Its operating regulations[7] mandated uniformity in card format and design, advertising by merchants, return of merchandise procedures, transaction reporting procedures, and floor limits. Membership was open to any commercial bank without geographical limit. All defendants except American[8] entered the market at the same time, issuing their bank charge cards in the autumn of 1966 at a single interest rate. The rate has not changed since that time.

B. Recruitment of Correspondent Banks of Continental[9]

During the summer of 1966, Continental began to recruit correspondent participation in the charge card pro-

[6] Central was a correspondent of Harris and Continental.

[7] The only copy of operating regulations in evidence is marked effective as of July 10, 1969. The court assumes the regulations to be identical to those adopted in October, 1966.

[8] American filed an application for membership in Midwest on March 26, 1969 and became a member on May 16, 1969.

[9] Because only Continental has moved for summary judgment on on the allegations of vertical conspiracy contained in Counts III and IV, the court will not review in a detailed fashion plaintiffs' evidence regarding the relationships between the other defendants and their respective correspondents.

gram. Continental held meetings with correspondent banks to disseminate information about and solicit participation in its Town and Country program. Notes of remarks prepared for delivery by Donald M. Graham of Continental at one such meeting state:

> When we decided to embark on the card program we made a fundamental decision. This was to the effect that our system must be developed and implemented must in a way that would merit the complete support and participation of our correspondent banks. It could not be a "Continental Plan" because we cannot in fairness promote Continental's name at the expense of our correspondents . . . In assuming this posture, we are not asking you to believe that we are *magnanimous*, but only that we are *realistic*. For we know that this plan can succeed only with your support, and we know that such support can be merited only if we play this game by ground rules that are equitable and that accord full respect for your position as our partners. I believe you will find, as the program unfolds this morning, that the concept we have created achieves that objective.

Graham's notes prepared for a similar meeting contain the statement:

> Because of antitrust implications, we are advised by counsel that we cannot attend meetings where our competitors are present and at which discounts, [prices, scratched out] terms, and conditions are discussed. However, there is no reason why we cannot have meetings such as this one with our own Town & Country banks. Moreover, I want to point out that if you so desire, our people will come to you at any time to discuss our mutual problems, providing such meetings are confied to banks participating in the Town & Country program.

Continental's study of the program's feasibility shows an awareness of the fact that, if it proceeded alone, it would

have to solicit correspondent banks' merchant clients for accounts, which would damage its business relationship with the correspondents. The same study shows Continental's knowledge that soliciting correspondents' merchants might make correspondents choose to enter the market to solicit merchants and sign cardholders, action which would have diluted the market available to Continental.

Continental distributed outlines of the plan to correspondent banks; and, as follows, explained the proposed procedure for direct participation.

> A participating merchant would sell merchandise or services to a card-holding customer and imprint a sales slip with the customer's name and other information on the charge card.
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> The merchant would deposit the sales slip with his bank, which would credit the merchant's account with the face amount of the sales slip, less discount, as agreed upon between the merchant and his bank. The bank receiving the sales slip would forward it to the bank which issued the charge card which in turn would pay the sending bank the amount of the sales slip. This forwarding process probably would be through a clearing facility similar to that used for clearing ordinary bank checks.
>
> The bank which issued charge card would bill the cardholder periodically for the unpaid balance in his card account plus any fees or interest charges agreed upon between the bank and its customer. Any bank in the Chicago Metropolitan Area (including the two Indiana counties) and later expanded to the entire State would be eligible to participate as a member of the system, either as an issuer of credit cards or a processor of merchant sales slips, or both. Each member bank would be free to set its own terms on which it would do business with its card holding customers and its merchants.[10]

[10] Other banks sent out similar mailings.

Ultimately, Continental began to communicate information concerning cardholder interest rate to correspondents who had chosen to affiliate with the Town and Country program Continental mailed explanatory memoranda to correspondents which contained interest rate information.[11] Continental's feasibility study limited dissemination of interest information to banks which elected to join the Town and Country program:

> The compatible system allows any bank to enter the system as either a merchant bank or a cardholder bank. Continental stands ready to help correspondents in any way possible . . . . Because of antitrust implications, Continental cannot discuss merchant or cardholder rates or terms [with correspondent banks which elect to become full card-issuing members of the compatible system].

Continental's contract with its correspondent provided that the latter would cooperate in recruiting merchants and in furnishing names of potential cardholder customers to Continental.[12] Cards issued through the correspondent would bear the correspondent's name, rather than Continental's. The correspondent would also ararnge for Continental to explain to correspondent merchant clients the operational procedures. Participating merchants would deposit sales slips with the correspondent, which would receive a portion of the merchant discount income when the slips were turned over to Continental.

Because Continental, and not the correspondent, extended credit to the cardholder, Continental determined and fixed the interest rate. The correspondent bank agreement provides:

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[11] First distributed to its correspondent banks copies of its standard form contract for participation in the FirstCard correspondent plan, which contained interest rate information.

[12] Other defendants' contracts contained similar provisions.

> Correspondent shall have no obligation with respect to any credit risk or collection expense with respect to and amount owing by reason of the use of a Town & Country Correspondent Card or other Midwest Bank Card.

The contracts between Continental and its correspondents as of November, 1966, February, 1970, and thereafter, make no reference to the cardholder interest rate to be charged. They also do not contain any requirement that the correspondent refrain from becoming a card-issuing bank and are terminable at will by the correspondent on 30 days notice. Moreover, in the autumn of 1967, Continental sent correspondents a summary of various ways of engaging in the charge card business besides participation in the Town and Country program.

While under the standard form contract, Continental correspondents were entitled to a percentage of the merchant discount income only, three of the correspondents ultimately executed participation agreements entitling them to a percentage of the finance charge receipts in exchange for proportionate responsibility for loss sharing in the event of non-payment by the cardholder. These banks were the First National Bank of Springfield, the Palatine National Bank, and the Sandwich State Bank. None of Continental's other Town and Country correspondents shares in interest income.

C. American's Entry into the Midwest Bank Card System

American did not join the Midwest Bank Card System, Inc. until the spring of 1969, although Rod Daly, an American operations officer, attended some of the Midwest organizational meetings in 1966. At that time, Daly reported the mechanics of setting up a charge card system to Allen P. Stults, American's chairman of the board of

directors and chief executive officer.[13] In late 1968, an American employee, Arthur Stump, met with Robert M. Martindale, Midwest's president, "to find out what [Midwest] was doing with charge cards, what people were doing with charge cards to better relate to what [American] might do." American subsequently hired James R. Kennedy, a former Continental employee whose job had been to oversee the Town and Country program and who was, as Stump explained, "thoroughly versed in charge cards."[14] Kennedy joined American as a second vice-president in charge of the bank's charge card operations, which he designed, instituted, and managed.

American determined to charge 1.5% per month for extended payment privileges "after consideration of a number of business factors such as the maximum interest rate permitted by law, projections concerning the length of time before American's bank card program might become profitable, and the interest rates charged under other credit arrangements such as those offered by various retail stores,

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[13] Stults explained Daly's investigation as follows:

> I don't know that he knew what other Chicago banks were planning. He knew what had come out of discussions that were had at the time as to the mechanical means of handling this by way of being informed in the event we were going to go into the business. . . . He acquired knowledge of what would be necessary for us to do things and our discussion was on that basis. I never asked him where did you get this or how did you do it or whether he got it reading books or keeping his ear to the ground.

[14] Plaintiffs have stressed the fact that Kennedy was employed by both Continental and American. While Kennedy played a role in determining American's interest rate policy, his uncontradicted deposition testimony establishes that Continental's charge card interest rate was set before he joined Continental and that he became aware of it in he process of checking cardholder applications which set out credit terms.

banks, and gasoline companies." The interest rate was never discussed with other bank representatives; and the rate determination was based entirely on deliberation and discussion among American officers and employees. Throughout his deposition, Kennedy's testimony on this point remained consistent, although he acknowledged that he was aware of the interest rate charged by other banks and various retailers, as a matter of public knowledge or, in the case of Harris' rate, because he was a Harris Charge-It cardholder. Stults testified that the rate determination followed the recommendation of Kennedy and Robert A. Abate, another American officer, after discussion among the banks executives. Moreover, American's internal study of the card program, prepared by Kennedy, projected that the program would not break even until its fourth year and that accumulated losses would not be recouped until its seventh year.

D. Entry in the Interbank Card Association

In February, 1967, the Interbank Card Association was formed to compete nationally with Bank of America's BankAmericard Service Corporation, the only other national bank charge card system. In April, 1967 Harris, Continental and First representatives met with Interbank personnel in New York to discuss Midwest's possible entry into Interbank. All three banks had been interested in the idea of a nation-wide charge card system even before the formation of Midwest.[15]

An internal Continental analysis of negative factors relating to the decision to join Interbank emphasized that the

[15] Aside from various meetings held with Interbank, Midwest members investigated other charge card systems with nationwide membership or potential membership. In early February, 1967, Midwest representatives met with California Bank Card Association personnel and with Bank of America representatives.

advantage of increased negotiability of an Interbank Master Charge card would be offset by several disadvantages. These included a vastly greater fraud risk due to the bank's lack of technical expertise with a nation-wide system, greater competition for merchant accounts, loss of regional sensitivity, and increased difficulty in achieving product differentiation. The study also reveals concern about possible antitrust problems:

> With any system acquiring the nation-wide dominance that the Interbank Association with the Master Charge Card face is acquiring, there is always some potential antitrust risk. In the opinion of our law firm, as well as counsel for Midwest and Interbank, this risk is not significant as both membership in Interbank and a license to issue Master Charge are nonexclusive and available to all applicants.

The study also stated:

> In any interchange environment, there is a possibility of intense competition driving discount rates to lower levels, as was evident here in Midwest. Presently, the transaction assessment incorporated within the Interbank regulations completely neutralizes this risk and results in a higher level of merchant discount rates than the par exchange we now have in Midwest. The Justice Department requires that the validity of this assessment be reviewed yearly and Touche Ross is now conducting this review.

In spite of these recognized difficulties, Midwest tentatively decided to join Interbank on November 8, 1968, providing that the details could be worked out. First, Harris and Continental agreed then that movement into Interbank had to be slow because of their lack of experience with a national program and its new fraud and credit problems. The Midwest Bank Card System formally joined Interbank on January 1, 1969. Harris breached the agreement to proceed slowly by issuing its Master Charge cards in May,

1969, prior to any Midwest coordinated card issuance. First left Midwest in January, 1970 to join BankAmericard and began soliciting the defendants' correspondent banks to participate in the BankAmericard program.

II.

Continental, Harris and American argue that none of the 964 documents nor the deposition testimony of 53 witnesses[16] on which plaintiffs say[17] they will rely at trial supports an inference of conspiracy among the defendants to fix the interest rate as alleged in Counts I through IV of the third amended complaint.[18] Rather, each defendant points to deposition testimony and documentary evidence which disclose that their decisions to charge 1.5% per month for deferred payment privileges were independent business decisions.

In support of its motion for summary judgment, Continental relies on the deposition of David M. Kennedy who testified that, in the summer of 1966, the only interest rate discussions he could recall were with Continental personnel:

> I was concerned about getting the highest interest rate legally permissible in order to—if we could—make it profitable. And so I was anxious to see that we get it up at the one and a half percent level, if we could.

Kennedy categorically denied discussing interest rates with representatives of First or of any defendant bank. Conti-

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[16] Thirty-six of the 53 witnesses named by plaintiffs have been deposed.

[17] In answers to interrogatories filed January 6, 1978, Plaintiffs specifically identified the documents and witnesses upon which they will rely at trial to prove their charges of horizontal conspiracy among the defendants to fix charge card interest rates.

[18] The allegations of horizontal conspiracy are Count I, ¶ 17; Count II, ¶ 18; Count III, ¶ 18; and Count IV, ¶ 19.

nental also relies on its correspondence with the Comptroller of the Currency and the deposition testimony of its officers and executives who worked on the program, all of whom deny that interest rates were discussed with the other alleged conspirators, or that the policy was other than independently formulated and implemented.

Harris makes an identical argument, based on the testimony of Carroll E. Prater and its independent loss projection studies. Harris also argues that 1.5% per month was the going market rate of revolving retail credit in 1965 and 1966, and that this fact was a matter of common knowledge among bankers and the general public.

While joining in its co-defendants' arguments, American states additional grounds which, it argues, make summary judgment on Count II[19] particularly appropriate as to it. Like the other defendants, in support of the argument that its choice of interest rate was independent, American relies on the affidavit and deposition testimony of its officers, James R. Kennedy and Allen P. Stults, and on its internal study which projected years of losses before its card program would become profitable. However, unlike the other defendants, American did not enter the charge card business until three years after its co-defendants; and hence, it argues, played no role in the formation of the Midwest Bank Card System when the alleged conspiracy originated.

Plaintiffs oppose the motions, arguing that the uniformity of interest rate, the evidence showing opportunity to conspire during organizational and informal meetings during Midwest's formation and integration into Interbank,

[19] Judge McMillen granted American's motion for summary judgment on Counts IV and VI, but denied the motion as to Count II, the only remaining count which names American. Decision, June 10, 1974 (McMillen, J.).

the market structure, and the artificial product standardization through the interchange system raise material issues of fact as to whether there existed a conspiracy to fix the interest rate. Plaintiffs' expert witness characterizes the Chicago banking industry in 1966 as an oligopoly dominated by its four biggest banks: First, Continental, Harris, and Northern. Each of these banks maintained business relationships with various smaller correspondent banks. The oligopoly, plaintiffs urge, provided the structural potential for collusion. As evidence of collusion, plaintiffs rely on deposition testimony by John B. Tingleff, a Continental executive, that in 1966 and 1967, charge cards were "a lively and pertinent topic" for bankers and that interest rates "probably . . . came up" in the course of various formal and informal bankers meetings. Robert M. Martindale, Midwest's president, and Allen P. Stults of American also testified regarding discussions of charge cards.[20] The nu-

[20] Excerpts of Martindale's deposition on which plaintiffs rely state:

> A. I have no recollection of any discussion concerning cardholder interest rate at Board of Directors meetings.
>
> Q. Other meetings besides Board of Directors meetings? . . . Formal or informal.
>
> A. The subject of cardholder interest rates was discussed often by banks and by people doing business with banks due to the truth in lending legislation being enacted, and before and after its enactment it continued to be a discussion or a point of discussion for both the public and the banks in communicating the amount of that rate to the public.
>
> Q. And in communicating between each other about the various problems of communicating with the public, for example, about those rates?
>
> A. I know of no official meeting or unofficial meeting for the purpose of discussing problems relating to the individual

merous organizational and social meetings offered many opportunities to conspire, plaintiffs argue. They insist that the restrictive provisions of Midwest's operating regulations further interfered with the development of competition in interest rates since defendants' cooperation consciously imposed limits on their ability to compete with each other.[21] Plaintiffs point to the deposition testimony of

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member banks in communicating that to their individual cardholders. I have no recollection of a specific meeting that that was the official topic or unofficial topic.

And plaintiffs similarly rely on Stults' deposition testimony:

Q. Did you discuss bank credit cards with any officer of another Chicago area bank in 1966?

A. If I had to guess, I would guess I must have. It was in the air. I don't recall any such conversations.

[21] The effect of Midwest's regulations, plaintiffs urge, is summarized in a November 17, 1966 letter by Mark H. Baxter, a First vice-president, in response to an inquiry about the development of the FirstCard program.

November 17, 1966

Dear M. Hammerschlag:

Bob Wilmouth has given me your letter because I had a major part in developing the marketing plans for FirstCard—our entry into the charge card business.

The planning of this activity has developed over a three-year period, but the detailed plans were made during the past six months under a good deal of time pressure because of the competitive situation in Chicago.

For a variety of reasons, we took the position that we did not want to enter this business unless we could provide a superior product for Midwest consumers and retailers. This attitude led to the development of the Midwest Bank Card system—a system of charge card banks which permits the

Gaylord A. Freeman, First's president and chairman of the board of directors, that "since nobody had a viable credit card [in 1966] and it was all new, if one of the others had aggressively merchandized the card at a lower [cardholder interest] rate, I think [First] would have had to

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interchange of sales slips and which makes any bank card good in any merchant establishment.

The development of the Midwest Bank Card system was concurrent with our own marketing planning and we are far from finished with either of these projects.

Here is some of the printed information about FirstCard and the Midwest Bank Card system which may give you a better understanding of what we are trying to do. We feel that our program and the MBC system represent a significant breakthrough in the charge card business and present a sound base for eventual nation-wide interchange among charge card banks.

Mr. Douglas Freeth of the Marine Midland Corporation in Buffalo is leading a group of banks who expect to participate in national interchange shortly. I feel that the interchange concept has greatly changed many of the marketing considerations for the charge card business.

You are quite correct in assuming that our basic marketing objectives and strategy are highly confidential, as is our marketing plan. The competitive situation in Chicago is much more severe than elsewhere in the country (including Pittsburgh) because five major banks have entered this business simultaneously and, in order to provide a better product for the customer we have all been willing to accept limitations which reduce our opportunity to gain a competitive advantage.

I don't think there is very much more that I can tell you in a letter, but if you happen to be in Chicago I am sure one of us could spend some time with you and, if you have any specific questions, we would be glad to try to answer them.

Sincerely,
Mark H. Baxter
Vice-President

go too, at the lower rate, too."[22] Plaintiffs argue that this evidence raises material issues of fact which bar entry of summary judgment.

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[22] Plaintiffs have also devoted some argument in their brief to the defendants' joint lobbying in the Illinois state legislature for clarifying legislation on charge card interest rates. Such joint activity is immunized from antitrust liability under *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), and *United Mine Workers of America* v. *Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965). *See also Metro Cable Co.* v. *CATV of Rockford, Inc.*, 516 F.2d 220, 227-28 (7th Cir. 1975). While dicta in *Pennington* suggests that evidence of lobbying may be introduced to show the purpose and character of other transactions under scrutiny, the decision whether to admit such evidence rests in the discretion of the trial judge, 381 U.S. at 670, 71 n. 3, 85 S.Ct. 1586; *Lamb Enterprises* v. *Toledo Blade Co.*, 461 F.2d 506, 516 (6th Cir.), *cert. denied*, 409 U.S. 1001, 93 S.Ct. 325, 34 L.Ed.2d 262 (1972); *United States* v. *Johns-Manville Corp.*, 259 F.Supp. 440, 453 (E.D.Pa. 1966). Recognizing that formalistic exclusionary rulings have no place in disposition of motions for summary judgment, the court must nonetheless decline to consider evidence of defendants' joint lobbying. The court has serious misgivings as to the propriety of relying on such evidence, in light of its minimal probative value as well as inevitable prejudicial effect on a jury. Accordingly, it will not be considered here as evidence in opposition to defendants' motions for summary judgment. *See* G. J. Moore's Federal Practice 56.11[1.-8], at 56 05 07 (2d ed. 1976).

III.

[1-3] These facts are governed by the following principles of law. In a motion for summary judgment, the moving party must sustain the burden of showing the absence of any genuine issue of fact; and all evidence and inferences therefrom must be construed in the light most favorable to the opposing party. *United States* v. *Diebold*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962); Rule 56, Fed.R.Civ.P. Particularly in antitrust suits, the remedy of summary judgment should be sparingly used since the evidence is likely to be complicated and extensive. *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962); *see also Norfolk Monument Co.* v. *Woodlawn Memorial Garden, Inc.*, 394 U.S. 700, 704, 89 S.Ct. 1391, 22 L.Ed.2d 658 (1969). And it is the rare case where the evidence available to both sides is fully explored before trial and where the defendants can establish that the evidence is not susceptible of the inferences plaintiffs urge. *Modern Home Institute, Inc.* v. *Hartford Acc. & Ind. Co.*, 513 F.2d 102, 109 (2d Cir. 1975). However, once the moving party has met the burden imposed by Rule 56 and has demonstrated that the facts on which the plaintiffs rely are not susceptible of the interpretation sought to be given them, plainiffs must show the exisence of significant probative evidence supporting the inference urged by them or face summary judgment dismissing the complaint. *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 289-90, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968); *Modern Home Institute, Inc.* v. *Hartford Acc. & Ind. Co.*, 513 F.2d at 109 n. 10.

[4] This case has been pending for eight years, during which plaintiffs have conducted substantially unlimited discovery, including at least 71 depositions, 297 interrogatories, 128 requests for admission, and innumerable document production requests. In their answers to interrogatories

filed January 6, 1978, plaintiffs identified 964 documents and named 53 witnesses on whose testimony they intend to rely at trial to establish their conspiracy charges. Hence summary judgment cannot be denied because of the incompleteness or inconclusiveness of the factual record, or because of substantial credibility issues, such as influenced the Supreme Court in reversing a grant of summary judgment in *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458. Plaintiffs have confronted all the defendants' officers and employees who were involved in any way in the development and implementation of the various bank programs, the establishment of Midwest, and the entry into Interbank. The available documentary evidence has also been exhausted; plaintiffs have had ample opportunity, of which they have availed themselves, to examine defendants' files and records for any document relating to the setting of cardholder interest rates.

[5] Under these circumstances, unless plaintiffs have uncovered evidence supporting their conspiracy charge, it is unclear how, in the face of defendants' uncontradicted deposition testimony negating it, trial would give them any further opportunity to elicit from defendants, their officers, and employees, evidence tending to prove it. If the most that can be hoped for is the possibility of discrediting defendants' denials at trial, no issue of material fact is presented. *Modern Home Institute, Inc.* v. *Hartford Acc. & Ind. Co.*, 513 F.2d at 110. "[S]ummary judgment cannot be defeated by the vague hope that something may turn up at trial." *Perma Research and Development Co.* v. *Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969). "Facing the sworn denial[s] of the existence of conspiracy, it [is] up to plaintiff[s] to produce significant probative evidence by affidavit or deposition that conspiracy existed if summary judgment [is] to be avoided." *Lamb's Patio Theatre* v. *Universal Film Exchanges*, 582 F.2d 1068, 1070 (7th Cir. 1978).

[6] It is settled that parallel business behavior is insufficient by itself to find a conspiracy that violates the Sherman Act. In *Interstate Circuit, Inc.* v. *United States,* 306 U.S. 208, 59 S.Ct. 467, 83 L.Ed. 610 (1939), a movie theater chain sent identical letters to eight distributor defendants, disclosing the names of the other addressees and demanding that the distributors require first run theaters leasing films from them to charge at least 40¢ admission and that second run theaters charge at least 25¢ and refrain from showing double bills. In affirming the conviction, the Supreme Court held that where all defendants had knowledge of the restrictions imposed by the others, and knew they would profit from concerted action and suffer from taking the complained of action alone, the lack of any direct evidence of agreement was not fatal to a finding of conspiracy. The Court stressed that defendants had no witness testify to deny the conspiracy. 306 U.S. at 225-26, 59 S.Ct. 467. In *Theatre Enterpries, Inc.* v. *Paramount Film Distributing Corp.,* 346 U.S. 537, 74 S.Ct. 257, 98 L.Ed. 273 (1954), the owner of a suburban theater sued several film distributors who had all refused to give him first run films. Defendants denied they had engaged in concerted action and presented evidence of economic reasons for their independent refusals to deal with the plaintiff. The trial judge denied plaintiff's motion for a directed verdict and the jury returned a verdict for defendants on the issue of conspiracy. In affirming that plaintiff had no right to a directed verdict, the Court stated:

> To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement. . . . But this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. 346 U.S. at 540-41, 74 S.Ct. at 259. (Citations omitted.)

Then, in *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569, the Court upheld a grant of summary judgment despite plaintiff's showing of parallel business behavior by defendants. Plaintiff there complained of a joint refusal by defendants to purchase Iranian oil which he sought to sell. His only evidence of Cities Service's participation in the alleged conspiracy was its refusal to buy oil from him. In its motion for summary judgment, Cities Service adduced evidence of independent economic reasons for its refusal to do business with plaintiff and evidence that, insofar as the oil business was concerned, its interests were more similar to plaintiff's than to those of its alleged co-conspirators. In affirming the grant of summary judgment, the Court distinguished *Interstate Circuit*, finding that it

> differs from the case at hand in precisely the same way that *Poller* [v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458] does, namely, in the inferences of motive that can reasonably be drawn from the facts. The reason that the absence of direct agreement in *Interstate Circuit* was not fatal is that the distributors all had the same motive to enter into a tacit agreement. . . . Here Waldron is unable to point to any benefits to be obtained by Cities from refusing to deal with him and, therefore, the inference of conspiracy sought to be drawn from Cities' "parallel refused to deal" does not logically follow.
>
> *Theatre Enterprises* . . . merely reiterated the holding of *Interstate Circuit* that "business behavior is admissible circumstantial evidence from which the fact finder may infer agreement" . . . in the course of ruling that the parallel behavior there shown did raise a conspiracy issue for the jury, which permissibly resolved it in the defendants' favor on the basis of other contrary evidence in the case. It did not purport to deal with the situation where the interests of the parties whose behavior was "consciously parallel"

were substantially divergent and thus is inapplicable here. 391 U.S. at 287-88, 88 S.Ct. at 1592 (Citations and footnotes omitted.)

[7, 8] From these cases, the rule emerges that while proof of parallel business activity does not in itself establish a Sherman Act violation, it is circumstantial evidence from which an agreement may be inferred. However, such evidence, standing alone, "is insufficient unless the circumstances under which it occurred make the inference of rational, independent choice less attractive than that of concerted action." *Bogosian* v. *Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086, 98 S.Ct. 1280, 55 L.Ed.2d 791 (1978); *see also Independent Iron Works, Inc.* v. *United States Steel Corp.*, 322 F.2d 656, 661 (9th Cir.), *cert. denied*, 375 U.S. 922, 84 S.Ct. 267, 11 L.Ed.2d 165 (1963); *FTC* v. *Lukens Steel Co.*, 454 F.Supp. 1182 (D.D.C1978). The test has been stated in various ways. One court has said that the inference of concerted action is warranted in circumstances where there is:

> (1) a showing of acts by defendants in contradiction of their own economic interests . . .; and
>
> (2) satisfactory demonstration of a motivation to enter an agreement . . . . *Venzie Corp.* v. *United States Mineral Prod. Co.*, 521 F.2d 1309, 1314 (3d Cir. 1975).

Other cases speak in terms of a "plus factor" which presence is required, along with a showing of parallel business behavior, to justify an inference of conspiracy. *Gainesville Utilities* v. *Florida Power & Light Co.*, 573 F.2d 292, 301 n. 13 (5th Cir.), *cert. denied*, —— U.S. ——, 99 S.Ct. 454, 58 L.Ed.2d 424 (1978), and cases cited therein; *see generally* L. Sullivan, *Handbook of Antitrust* 315-19 (1977). The test cannot be mechanically applied. The question is whether the evidence taken as a whole warrants an inference of joint, consensual conduct rather than independent, individual action. Moreover, inferences drawn

from circumstantial evidence must be logical and reasonable, not based on speculation or conjecture. *Franck* v. *Carborundum Co.*, 437 F.Supp. 83, 85 (N.D.Cal.1977).

[9] The court turns, then, to apply these rules to the case before it. The heart of plaintiffs' case rests on evidence, which defendants do not contest, showing the universal adoption of identical cardholder interest rates which have not changed since the inception of Midwest. Plaintiffs argue, and defendants concede, that an identity of interest rates was not essential to the success of the Midwest Bank Card System, since each defendant dealt separately with its cardholding customers and individually different interest rates in theory could have evolved without affecting the system as a whole. Such rates could, and plaintiffs urge, should have been based on the creditworthiness of individual cardholders. However, defendants' affidavits, deposition testimony, answers to interrogatories and documentary evidence show that Continental, Harris and American independently projected high start-up costs and early losses; they independently determined their respective programs required that the highest interest rate legally permissible be charged. The uncontradicted testimony of every bank employee consistently denies that interest rates were discussed among the alleged co-conspirators, or that interest rates were consensually determined. The showing of parallel behavior under these circumstances, where each bank faced identical problems of fraud, credit losses, and large initial expense to which reasonable businessmen would react in the same fashion, does not provide a basis for the inference of the conspiracy which plaintiffs allege.

[10] The burden then shifts to plaintiffs to come forward with significant probative evidence tending to support the complaint, to show that the rate set was counter to defendants' interests and accompanied by a motive to enter into

an agreement, to demonstrate a "plus factor", or face summary judgment dismissing the complaint. *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. at 289-90, 88 S.Ct. 1575; *Venzie Corp.* v. *United States Mineral Prod. Co.*, 521 F.2d at 1314; *Gainesville Utilities* v. *Florida Power & Light Co.*, 573 F.2d at 301 n. 13. In an effort to discharge this burden, plaintiffs rely on evidence of opportunity to conspire, market structure, similarity of economic interest among defendants and the mechanics of the interchange system.

With regard to opportunity to conspire, one court has said:

> Opportunity evidence may be arranged along a continuum of persuasiveness, from that which merely prevents a negative inference by demonstrating that communication and thus agreement were physically possible, to evidence of specific contacts and exchanges of information or suggestion which makes agreement in some measure more probable. *Overseas Motors, Inc.* v. *Import Motors Limited, Inc.*, 375 F.Supp. 499, 534 (E.D.Mich. 1974), *aff'd*, 519 F.2d 119 (6th Cir.), *cert denied*, 423 U.S. 987, 96 S.Ct. 395, 46 L.Ed.2d 304 (1975).

Most of plaintiffs' evidence is opportunity evidence and the bulk of that evidence is in the "mere possibility" range. Into this range falls evidence that many of defendants' officers were acquainted socially and professionally and that bank charge cards were a "lively and pertinent topic" for bankers in 1966 and 1967, a topic that was "in the air." However, plaintiffs rely most heavily on the numerous organizational meetings between defendants to set up Midwest and to enter Interbank as "specific contacts" which provided multiple opportunities to conspire. But plaintiffs have confronted every person who attended those meetings, examined the minutes of and documents generated by each meeting, and found no evidence which affirmatively supports their theory.

The evidence shows that defendants were aware of potential antitrust problems when they established Midwest; and hence, were careful not to discuss rate-setting nor to conduct joint market research. Plaintiffs point to internal memoranda by Continental and Harris concerning timing the service's introduction to avoid market "chaos". But these documents as a whole do not offer a basis for an inference of conspiracy. Rather, they reflect concern over implementing the compatible system. For the alternative to the compatible system would have been for each bank to set up its own program where its cards could be used only at merchant places of business which signed with such bank. To obtain the same volume of customer use, each merchant would have to sign as many agreements as there were banks with charge card programs. Merchants would have to distinguish between a substantial number of card issuers, each with a different system of regulations to be followed. Cardholders would have to make a special effort to search out merchants who had signed agreements covering the particular card that they carried. The memoranda discuss avoiding this multiple program situation and making the charge cards commercially feasible from the merchant's point of view by making them widely negotiable through the compatible system. The market "chaos" was to be avoided by compatibility in delivery of the charge card service, which is unrelated to payment for the use of the credit.

Only two documents produced during discovery even mention the subject of interest rates. The minutes of the May 22, 1966 meeting attended by First, Harris and Northern representatives state:

> Lewis [of Harris] commented that the maximum must be no more than the equivalent of 7% add-on per annum or less than 14%. Foote [of Harris], who said he had looked into credit cards on his own for Harris

> some months ago, found specific revolving credit enabling legislation in other states where 1½% per month is in effect. Wood [of First] commented that this is troubling First's lawyers, too.

Representatives of the same three banks attended a meeting four days later which minutes state: "Wood [of First] said the First's lawyers had two legal questions—rate and antitrust—and the antitrust seemed to be the easier of the two." But these expressions of questions concerning the legal environment faced by the banks do not constitute a discussion of any bank's intention as to what rate it might ultimately charge. Plaintiffs concede, as they must, that the banking industry is heavily regulated; the legislature determines the top price which may be charged for bank credit. The casual expression of concern over the impact of regulation cannot sustain an inference of conspiracy.

Midwest's coordinated entry into Interbank offers plaintiffs no support. Plaintiffs rely on a Continental internal memorandum analyzing the drawbacks of Interbank membership. But the document does no more than state the problems posed by participation in a large compatible system: the greater fraud and credit risks raised by a national market in which Continental lacked expertise. The passing reference to Interbank's different procedure for handling merchant discount does not compel an inference of interest rate conspiracy. Moreover, the court notes that summary judgment has been entered for defendants on the charges of conspiracy to fix the merchant discount rates.[23]

Defendants have offered sworn denials of the existence of conspiracy, and a persuasive rationale for their parallel conduct which is consistent with their individual interests

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[23] See n. 2, *supra*.

and with independent competitive behavior. Under these circumstances, the inferential leap from opportunity to conspiracy is illogical. And evidence of opportunity to conspire here cannot alone bar summary judgment, for "[i]f the most that can be hoped for is the discrediting of defendants' denials at trial, no question of material fact is presented." *Modern Home Institute, Inc.* v. *Hartford Acc. & Ind. Co.*, 513 F.2d at 110.

Plaintiffs' argument regarding market structure requires a similar response, for it is simply a variation of their argument regarding opportunity to conspire. Plaintiffs argue that the market structure of the Chicago banking industry in 1966 was oligopolistic and therefore conducive to collusion. Even assuming this characterization to have merit, it cannot constitute a "plus factor" sufficient to bar summary judgment. The fact that market structure might have permitted collusion does not allow the inference that collusion occurred where, as here, defendants have offered sworn, credible denials of the existence of conspiracy and years of discovery by plaintiffs has uncovered no affirmative evidence of this kind of conduct.

Plaintiffs argue that "common interests and needs" of the defendants made collusion "feasible and often desirable." But to hold this sufficient to raise an inference of conspiracy "would give free rein to any plaintiff who can draft an antitrust complaint capable of withstanding a motion to dismiss to go to trial with only a wing and a prayer supporting his well drafted complaint." *Mutual Fund Investors* v. *Putnam Management Co.*, 553 F.2d 620, 624 (9th Cir. 1977); see also *Lupia* v. *Stella D'Oro Biscuit Co.*, 586 F.2d 1163, 1167 (7th Cir. 1978); *Solomon* v. *Houston Corrugated Box Co.*, 526 F.2d 389, 393-94 (5th Cir. 1976). Plaintiffs mistakenly believe that summary judgment cannot be granted unless the moving defendants can

show that their interests are divergent from those with whom they allegedly have conspired. But if this were so, then defendants with similar business problems who respond to those problems in independent identical fashion could never successfully move for summary judgment; the complaint would be sufficient to raise an inference of conspiracy. But Rule 56 does not apply differently to antitrust cases than to others. Here, defendants have shown that the rate each charged was mandated by their individual needs and not counter to their individual interests. See *Venzie Corp.* v. *United States Mineral Prod. Co.*, 521 F.2d at 1314. The fact that each faced similar business problems does not support an inference of conspiracy.

Plaintiffs point to the mechanics of the interchange system as evidence of artificial product standardization and of barriers to potential entry from which an inference of conspiracy may be drawn. However, the most rational inference that can be drawn from the uniformity of card format, imprinter, sales slips, and merchant regulations is that these features were necessary for the operation of a compatible card system. In this context, it is important to bear in mind that the compatible card system is not itself under antitrust attack; the by-laws and operating regulations on which plaintiffs rely have nothing directly to do with interest rate or other terms of credit between any bank and its customers. As Carroll E. Prater of Harris stated:

> Obviously [the Midwest] system to insure prompt interchange of sales slips between banks had to include a uniform type credit card with a common identification mark or logogram, a uniform sales slip for merchant use, a standard type machine for functioning the sales slips, and finally the key to the whole compatible system . . . a method of clearing or transferring slips between banks.

The uniform floor limits, advertising limitations, merchandise return procedures transaction reporting procedures, card format and design and cash advance limits are most logically construed as mechanical rules for performing the sales reporting and cash advance functions of the compatible card system. The uniform floor limit is the dollar amount of the sale by any merchant, which, if exceeded, requires the merchant to call the card-issuing bank to receive authority to make the sale. Its uniformity removes the necessity for the merchant to distinguish between the cards of different banks when making sales; it increases the cards' negotiability by making it simpler for merchants to honor them. Uniform advertising limitations, card format, and design similarly increase the cards' negotiability by preventing confusion over whether a merchant will honor only charge cards issued by only one bank as distinguished from those issued by all the banks. Uniform merchandise return procedures reduce the opportunity for fraudulent billing by requiring that refunds to customers who have been charged for purchases on their bank charge cards be by credit slip issued by the merchant rather than in cash. Uniform transaction reporting procedures facilitate the transfer of slips between banks. Uniform cash advance limits are agreements by which Bank A, a system member, agrees with Bank B, also a system member, that it will make cash advances in particular amounts to Bank B's customers if Bank B will make advances in the same amounts to Bank A's customers. The uniformity eliminates the need for a teller to determine whether a particular restriction exists with respect to any particular card when its holder seeks a cash advance; it is a feature of compatibility which increases card negotiability. Hence, none of the mechanical details on which plaintiffs rely are anything more than contractual provisions to facilitate the

sales, reporting, and cash advance features of the compatible card system. They do not supply a "plus factor" warranting an inference of conspiracy to fix the interest rate.

An examination of the cases on which plaintiffs rely shows the propriety of granting summary judgment in this case. In *C-O-Two Fire Equipment Co.* v. *United States*, 197 F.2d 489 (9th Cir.) *cert. denied*, 344 U.S. 892, 73 S.Ct. 102, 97 L.Ed. 695 (1952), the court upheld a Sherman Act conviction for price-fixing where four competing manufacturers held regular meetings, engaged in a stringent product standardization program, raised prices at a time of industry surplus, made identical bids on public contracts, used illegal identical restrictive licensing agreements, and rigorously policed these arrangements. Plaintiffs argue that in *C-O-Two* the court found the meetings a "plus factor" even though there was no direct evidence of what transpired at the meetings and therefore this court should draw the same conclusion regarding the Midwest meetings. 197 F.2d at 493. Plaintiffs mistake the significance of the meetings in the view of the court in *C-O-Two*; the finding of conspiracy was held to be warranted in light of the other factors: identical bids, unnecessary product standardization, illegal licensing contracts, dealer policing, and identical price increases at times of surplus, coupled with the fact that the defendants offered no evidence in rebuttal. 197 F.2d at 491, 496-97. Unlike this case, in *C-O-Two*, the inference of concerted action was stronger than that of independent action.

In *Cackling Acres, Inc.* v. *Olson Farms, Inc.*, 541 F.2d 242 (10th Cir. 1976), *cert. denied*, 429 U.S. 1122, 97 S.Ct. 1158, 51 L.Ed.2d 572 (1977), the court affirmed a jury verdict for plaintiff egg producers who sued several egg distributors alleging a conspiracy to depress the price of eggs. In holding the evidence sufficient to support a finding of conspiracy, the court relied on evidence, not specifically

discussed, of numerous meetings and telephone calls "all in furtherance of the conspiracy to peg egg prices . . . ." 541 F.2d at 245. In this case, there is no affirmative evidence of actions by the defendants in furtherance of a conspiracy.

In *Gainesville Utilities* v. *Florida Power & Light Co.*, 573 F.2d 292, the court reversed a jury verdict and held that the evidence compelled a finding of conspiracy to divide the state wholesale power market. Plaintiff, a municipal utilities system, brought suit against a utility company that refused to interconnect with the city's power system, alleging that the refusal was based on the company's unwillingness to invade its competitor's territory. The court rejected defendant's argument that the refusal was based on independent business reasons since the evidence showed a constant stream of correspondence between defendant's and its competitor's executives which not only shared information regarding the refusal but expressed the decision "in terms of hopeful, if not expected, reciprocity." 573 F.2d at 301. The court found that the constant exhortations of reciprocity against a backdrop of prior territorial division agreements, along with the fact that there could be no conceivable business reason for communicating with the competitor, mandated a finding of conspiracy. *Id.* Plaintiffs argue that the exchange of letters here, as in *Gainesville Utilities,* warrants a conspiracy finding. But there, it was not the mere fact of correspondence, but the letters' content, which led the court to find a conspiracy. In this case, such correspondence as exists is not inculpating and was reasonably required by the lawful joint venture in which defendants were engaged.

Accordingly, whether viewed as a failure to produce significant probative evidence tending to support the complaint, or evidence of action contrary to their economic

interests and of motivation to conspire, or evidence of a "plus factor", plaintiffs have failed to rebut defendants' showing that the complained of conduct was the product of independent business decisions rather than of conspiracy. Under these circumstances, defendants' motions for summary judgment as to the horizontal conspiracy allegations of the complaint must be granted.

The court now turns to Continental's motion for summary judgment as to the charges of vertical conspiracy between it and its correspondents in Counts III and IV of the third amended complaint. In support of its motion, Continental has submitted the affidavit of John B. Tingleff, its vice-president in charge of correspondent banking in the midwest and, in 1966, in charge of implementing the Town and Country program. Tingleff avers that nothing in the contracts implementing the program fixed or was meant to fix any cardholder interest rate charged by Continental or its correspondent banks, nor to allocate customers, nor to obligate other contracting banks to refrain from competing with Continental. He states that there was no agreement, by contract or otherwise, on these subjects with the correspondent banks. Continental also relies on the standard form contracts between itself and its correspondents, which make no reference to interest rate, contain no requirement that the correspondent refrain from becoming a card-issuing bank, and are terminable at will by the correspondent on thirty days notice. Taken together, Continental argues, the contracts and affidavit establish that there never was a conspiracy between itself and its correspondents.

Plaintiffs urge that the evidence adduced during discovery is sufficient to warrant the inference that Continental divided the bank charge card market with its correspondent banks, thus avoiding the possibility of dilution of the potential cardholder market and the introduction of price competition, had correspondents chosen to become card-

issuing banks, and that Continental and its correspondents fixed the cardholder interest rate. To support these assertions, plaintiffs rely on the fact that no card-issuing competition actually ever developed between Continental and its correspondents, coupled with notes of remarks prepared for delivery by Continental officers at correspondent recruitment meetings, and the dissemination of interest rate information to correspondents who elected to participate in the Town and Country program.

[11] The fact that card-issuing competition did not develop is insufficient to raise an inference of conspiracy in light of defendant's affidavit and documentary evidence denying the existence of conspiracy. Like plaintiffs' arguments regarding the named defendants' parallel business behavior, plaintiffs' arguments regarding the lack of competition cannot raise an issue of material fact which will bar summary judgment absent a showing of significant probative evidence tending to support the complaint, or a showing of acts counter to the correspondents' and Continental's interests coupled with a motive to conspire, or a showing of a "plus factor". *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. at 289-90, 88 S.Ct. 1575; *Venzie Corp.* v. *United States Mineral Prod. Co.*, 521 F.2d at 1314; *Gainesville Utilities* v. *Florida Power & Light Co.*, 573 F.2d at 301 n. 13.

Plaintiffs argue that the recruitment meetings constitute a "plus factor" since they offered Continental and its correspondents numerous opportunities to conspire. But plaintiffs have confronted all the witnesses and examined all the documents generated by those meetings and none of their proffered evidence even suggests a single instance in which any Continental representative sought or obtained any views or opinions from a correspondent banker, much less

agreed with any correspondent banker, on the rate to be charged cardholders. Indeed, notes of remarks prepared for delivery at recruitment meetings suggest that, while Continental solicited correspondent participation in the program,[24] it was aware that interest rates could not be discussed:

> Because of antitrust implications, we are advised by counsel that we cannot attend meetings where our competitors are present and at which discounts, [prices, scratched out] terms, and conditions are discussed.

Indeed, Continental sent correspondents a summary of various ways of engaging in the charge card business without participation in the Town and Country program. In light of Continental's sworn denial and the total absence of affirmative evidence to support the vertical conspiracy allegations, plaintiffs' arguments regarding opportunity to conspire are insufficient to bar summary judgment.

[12] The dissemination of interest information to the correspondent banks does not constitute a "plus factor." The evidence shows that Continental distributed interest rate information only to those correspondents solicited to participate in the Town and Country program. And plaintiffs do not dispute the fact that Continental had a right to determine the interest rate charged customers who received Town and Country cards from the various participating correspondents because Continental, and not the correspondent, extended credit to the customer. The evi-

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[24] Plaintiffs do not allege that the correspondent participation itself offers any basis for inferring the existence of conspiracy nor does the court perceive any reason to suppose that Continental's correspondent relationships pose any antitrust problem. *Cf. United States* v. *Citizens and Southern National Bank*, 372 F.Supp. 616 (N.D.Ga. 1974), *aff'd*, 422 U.S. 86, 95 S.Ct. 2099, 45 L.Ed.2d 41 (1975).

dence shows that Continental unilaterally determined the interest rate to be charged Town and Country cardholders. There is no affirmative evidence suggesting that the distribution of interest rate information to participating correspondent banks ever rose to an exchange of views on that subject. Under these circumstances, the fact that the rate to be charged by participating correspondent banks was communicated to them by Continental cannot give rise to any inference of conspiracy.

Finally, plaintiffs suggest that the court should disbelieve Tingleff's affidavit on the ground that, as a Continental officer deeply involved in the Town and Country program, he is not a credible person. This argument is clearly insufficient to bar summary judgment, since if the most plaintiffs can hope for is to discredit Tingleff's denials at trial, no issue of material fact is presented. *Modern Home Institute, Inc.* v. *Hartford Acc. & Ind. Co.*, 513 F.2d at 110. "Facing the sworn denial of the existence of conspiracy, it was up to plaintiff[s] to produce significant probative evidence by affidavit or deposition that conspiracy existed if summary judgment was to be avoided." *Lamb's Patio Theatre* v. *Universal Film Exchanges*, 582 F.2d at 1070. In the eight years since this suit was commenced, plaintiffs have not uncovered any such evidence, and none has been offered to oppose this motion. Under these circumstances, Continental's motion for summary judgment as to the charges of vertical conspiracy must be granted.

III.

For these reasons, the motions of defendants Harris and American for summary judgment as to the charges of horizontal conspiracy among the named defendants in Counts I through IV of the third amended complaint are granted. The motion by defendant Continental for summary

judgment as to the charges of horizontal conspiracy with other named defendants in Counts I-IV and of vertical conspiracy between itself and its corespondent banks in Counts III and IV is also granted. As to the Continental Illinois National Bank and Trust Company of Chicago and the American National Bank and Trust Company of Chicago, this suit is dismissed.

So ordered.

Appendix

DESCRIPTION OF THE COMPATIBLE BANK CHARGE CARD SYSTEM

This lawsuit involves what is known as a compatible bank charge card system. In such a system, a card issued by one bank can be used for purchases at merchants who have a contract with another bank. The members of a compatible bank charge card system operate under rules, called operating regulations.

The Card-Issuing Bank and the Cardholder

A bank which issues bank charge cards is called a "card-issuing bank". A card-issuing bank provides a person who is called "cardholder" with a plastic charge card. The cardholder enters into a contract with a card-issuing bank which requires the cardholder to pay his bank for the money advanced by the bank for the purchases which the cardholder makes with his charge card, plus a finance or interest charge if payment is deferred beyond a specified number of days. The cardholder can, therefore, use his bank charge card to make a purchase from a merchant who accepts that charge card. The cardholder signs a charge ticket and receives a statement from his card-issuing bank on a monthly basis. If the cardholder pays the full amount specified in the statement within a stated period, no finance or interest charge is assessed. If he defers payment beyond

such a period, his card-issuing bank charges him a finance charge on the unpaid balance. The cardholder can also use his bank charge card to obtain cash from any bank in the compatible bank charge card system. The amount received by the cardholder, called a "cash advance," must also be repaid with a finance charge by the cardholder under his agreement with his card-issuing bank, and such amounts appear on the statement the cardholder receives from his card-issuing bank.

The Merchant and the Merchant's Bank

The merchant accepts a bank charge card instead of cash from the purchaser. At the time of such a purchase, the merchant requires the cardholder to sign a charge ticket, which the merchant then forwards to his own bank, here called a "merchant's bank", for credit to the merchant's account. The merchant's bank credits the merchant's account for the full amount of the charge ticket. For services rendered, the merchant's bank charges the merchant a fee, called the "merchant discount". The merchant's bank then forwards the charge ticket to the cardholder's own card-issuing bank sometimes directly and sometimes indirectly through another bank (the latter method is known as "interchange"). The card-issuing bank issues a credit to the merchant's bank and sends a statement to the cardholder listing this and other charge purchases he has made within a specified period.

In a compatible charge card system, procedures and rules are developed to regulate the interchange of charge card tickets and the payments among the card-issuing banks. The defendant banks (other than American) established such a system. American became a member of the system in 1969. Thus, for example, a bank charge card issued by defendant Continental can be used by the Continental cardholder at stores whose merchant bank is Harris Bank

and vice versa. Said defendant banks originally operated under the procedures and rules of Midwest Bank Card System, Inc. ("MBC"). In 1969, MBC joined the Interbank Card Association, Inc. ("Interbank") which used the trademark "Master Charge". At that time, defendants adopted additional procedures and rules of Interbank. Interbank or "Master Charge" cards can be used by cardholders at any merchant who accepts such cards.

(Excerpt from Agreed Pretrial Order)

APPENDIX C

Jack WEIT, James B. Cox and Robert W. McLallen, on behalf of themselves and all others similarly situated, Plaintiffs,

v.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, a corporation, Harris Trust and Savings Bank, a corporation, Pullman Bank and Trust Company, a corporation, Central National Bank in Chicago, a corporation, American National Bank and Trust Company of Chicago, a corporation, all other Illinois banks similarly situated, and Midwest Bank Card System, Inc., a corporation, Defendants.

No. 70 C1926.

United States District Court,
N. D. Illinois, E. D.

Sept. 6, 1979.

Class action was brought by bank charge card holders alleging that five banks conspired to fix rate of interest charged for extended payment privileges on credit card purchases. Motions for summary judgment were granted as to certain defendants, 467 F.Supp. 197. Subsequently, summary judgment motions were filed as to remaining issues and defendants. The District Court, Leighton, J., held that: (1) holders of cards issued by one bank had standing to challenge legality of other bank's conduct as members of the same credit card plan; (2) showing of parallel business behavior, i.e., setting of same interest rate, did not provide a basis for inference of the horizontal conspiracy where each bank faced identical business problems, i.e., large initial expenses, to which reasonable businessmen would respond in the same fashion; (3) evidence established

that defendants entered charge card business and set cardholder rates for individual, independent reasons; and (4) as regards alleged vertical conspiracy, plaintiffs could not press a claim against banks which had not issued their cards for alleged injuries done to latter's cardholders based on alleged conspiracy between such banks and their correspondents.

Motion granted; suit dismissed.

1. Federal Civil Procedure—2559

Prior interim ruling denying summary judgment motion did not bar reconsideration thereof after discovery had been completed and case was in a posture for trial. Fed. Rules Civ.Proc. rule 56, 28 U.S.C.A.

2. Monopolies—28(1.6)

Fact that summary judgment on horizontal conspiracy count had been entered in favor of bank which issued credit cards held by representative plaintiffs, complaining of alleged conspiracy between member banks of bank credit card system to fix interest rates, did not deprive plaintiffs of standing as regards conspiracy claims against other defendant member banks; cardholders were not to be denied standing merely because of their consumer status. Clayton Act, § 4, 15 U.S.C.A. § 15; Sheman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

3. Federal Civil Procedure—2544

Once a defendant moving for summary judgment meets his burden of demonstrating that the facts on which plaintiff relies were not susceptible to the interpretation sought to be given them plaintiff must come forward and show the existence of significant probative evidence supporting the

inference urged by them or face summary judgment dismissing the complaint. Fed.Rules Civ.Proc. rule 56, 28 U.S.C.A.

4. Monopolies—28(7.3)

While proof of parallel business activity does not itself establish a Sherman Act violation, it is circumstantial evidence from which an agreement may be inferred. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

5. Monopolies—28(1.6)

Holders of credit card issued by one defendant bank had standing to challenge legality of conduct of other issuing banks which were members of the same bank card system since plaintiffs would be affected by any unlawful horizontal conspiracy in which all member banks participated. Clayton Act, § 4, 15 U.S.C.A. § 15; Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

6. Monopolies—28(7.1, 7.4)

Showing of parallel business behavior, i.e., establishing same interest rates on credit purchases made on bank credit cards, did not warrant inference of horizontal conspiracy among member banks of bank credit card system where each bank faced identical business problems, including large initial expenses, to which reasonable businessmen would respond in the same fashion; hence, burden shifted to plaintiff cardholders to come forward with significant probative evidence supporting the inference urged, i.e., that rate set was counter to banks' interest and coupled with a motive to enter into an agreement, to demonstrate the "plus factor" or face summary judgment dismissing Sherman Act complaint. Fed.Rules Civ.Proc. rule 56, 28 U.S.C.A.; Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

7. Monopolies—28(7.4)

Evidence in action by holders of bank credit cards charging horizontal conspiracy to fix interest rates on charge card purchases established that defendant banks entered the charge card business and set cardholder interest rate for independent, individual reasons. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

8. Monopolies—28(7.4)

Where defendant banks, which were members of bank credit card system, offered sworn denials of existence of any conspiracy to fix interest rates on purchases under bank charge cards as well as a persuasive rationale for their parallel conduct which was consistent with their individual interests and with competitive, independent behavior, an inference of conspiracy under such circumstances based on evidence of opportunity to conspire would be illogical. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

9. Monopolies—28(1.6)

The "target area" concept of antitrust standing is interpreted to confer standing on all persons who, with reasonable foreseeability, would be affected by the anticompetitive conduct. Clayton Act, § 4, 15 U.S.C.A. § 15; Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

10. Monopolies—28(1.6)

Compatible features of bank charge card system were not connected with a conceivable vertical antitrust claim so as to allow holders of cards issued by one bank to press claim against other banks for alleged injuries done the latter's cardholders notwithstanding want of finding of any hori-

zontal conspiracy, since compatible features were merely procedures for interchange of sales slips generated at merchant places of business and various regulations of the systems related to mechanization of the interchange system, and there was no connection between operations of interchange system and charges which any particular bank made to its cardholders. Clayton Act, § 4, 15 U.S.C.A. § 15; Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

11. Federal Civil Procedure—2484

Even assuming that holders of credit cards issued by one bank had standing to challenge alleged subsidiary vertical conspiracy between other card-issuing banks and their correspondents and that such challenge did not fail even though no primary, horizontal conspiracy had been found, defendant banks were entitled to summary judgment in view of sworn denials of existence of conspiracy and want of affirmative evidence that dissemination of interest rate information to those correspondents solicited to participate in their program rose to level of an agreement and as to one bank, all correspondents were free to set any lawful interest rate they chose so long as former's return on receivables which it had purchased remained at specified rate. Clayton Act, § 4, 15 U.S.C.A. § 15; Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

12. Monopolies—28(1.6)

Since, absent horizontal conspiracy, holders of credit cards issued by one bank could not have been injured by any vertical conspiracy between another member bank and its correspondents concerning fixing of interest charges, plaintiff cardholders lacked standing to raise any claim aginst the latter, notwithstanding existence of evidence warranting inference that the other bank and its correspondents

prevented development of price competition between them and diluted the market by entering into a partnership that set a fixed price on the privilege of extended payments for cardholders. Clayton Act, § 4, 15 U.S.C.A. § 15; Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

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Arnold I. Shure, Chicago, Ill., for H. James Rosenberg.

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George W. Groble, pro se.

MEMORANDUM

LEIGHTON, District Judge.

On December 22, 1978, this court granted motions for summary judgment by defendants Continental Illinois National Bank and Trust Company of Chicago, Harris Trust and Savings Bank, and American National Bank and Trust Company of Chicago, as to the charges of horizontal conspiracy alleged in Counts I through IV of the third amended complaint and by defendant Continental as to the

vertical conspiracy alleged in Counts III and IV. The cause is now before the court on motions by remaining defendants Central National Bank in Chicago and Pullman Bank and Trust Company, for summary judgment on both the horizontal and vertical conspiracy allegations of Counts I through IV; and defendant Harris, for summary judgment as to the vertical conspiracy alleged in Counts III and IV. For the following reasons, the motions are granted.

I.

Many of the relevant, undisputed facts are stated in the court's memorandum of December 22, 1978. *See Weit* v. *Continental Illinois Nat. Bank & Trust Co.*, 467 F.Supp. 197, 200-205 (N.D.Ill.1978). The following additional facts, as drawn from the pleadings, depositions, affidavits, answers to interrogatories, and numerous documents produced in the course of discovery, are also relevant to disposition of these motions.

A. Central's Entry into the Midwest Bank Card System

Central was a late entrant into the Midwest Bank Card System; although it began seriously considering entering the bank charge card business in the summer of 1966, it did not actually join Midwest until October of that year. (Frank E. Bauder Dep. 9/18/75 at 12, 43.) In August, Frank E. Bauder, chairman of Central's board, learned of Pullman's planned Illinois Bank-charge from the newspapers and of Midwest's planned program from Robert Logan, Central's senior vice-president. (*Id.*, at 16, 18; Robert Logan Dep. 9/25/75 at 6, 9.) Although no Central representative attended the early organizational meetings held by Continental, Harris, First and Northern, Logan attended a presentation held for many banks of the proposed form of an interbank transfer mechanism for charge

cards in late August 1966 as well as a presentation by Pullman. (Robert Logan Dep. at 6, 14-16.)

Faced with what he perceived as a highly competitive situation in expanding bank services, Bauder held a meeting in early September with other Central officers to determine whether Central should enter the charge card business. (Frank E. Bauder Dep. at 13, 20, 26-29.) At the meeting, it was decided that Central should join the Midwest Bank Card System, because it could neither become a separate, independent card issuer since it lacked a sufficiently broad base in retail and merchant customers nor afford not to offer the charge card service because of potential customer loss. (Frank E. Bauder Dep. at 26-27, 45-47; Robert Logan Dep. at 17-18.) Also at the meeting, cardholder interest rate was implicitly determined since all Central officers thought that Central would have to charge the maximum legal rate in order for the program to be financially viable. (Frank E. Bauder Dep. at 29, 42; Robert Logan Dep. at 30-33; Lowell Taylor Dep. 9/24/75 at 60-61.) Central's counsel had advised it that 1.5% per month, or 18% annually, was the maximum rate that could be charged for extended payment privileges. (Frank E. Bauder Dep. at 29; Robert Logan Dep. at 33.) The high interest rate was taken for granted to be necessary since, as Bauder testified:

> There was no question in our minds—in my mind that even at that rate we were not going to be able to cover our costs. (Frank E. Bauder Dep. at 29; *see* PTX 84, at 2.)

Central then applied for membership as a card-issuing bank in the Midwest system in October 1966 and executed the interim agreement establishing the system on October 24, 1966. (PTX 42, 82-83; see PTX 98.) Lowell Taylor, Central's second vice-president, served as Midwest's secretary in 1967. (PTX 136.) And when Midwest ultimately

entered the Interbank-Master Charge Bank Card System, Central also became a member (Frank E. Bauder Dep. at 56-59.) During its membership in Midwest, Central's officers had little contact with the other named defendants regarding bank charge cards other than at formal Midwest meetings. (Robert Logan Dep. at 22-23.)

B. Pullman's Entry into the Midwest Bank Card System

Like Central, Pullman was not a member of the compatibility study group of early 1966 and did not become actively involved with Midwest until late September 1966. Unlike its co-defendants, however, Pullman had experience in the charge card field and had planned to issue its own card, Illinois Bankcharge in conjunction with several other small banks. Between 1953 and 1962, Pullman operated a bank charge program called Shoppers Charge. (Robert E. Kennedy Aff. 3/15/76 at ¶ 2.) As with the Midwest Bank Card programs, Shoppers Charge generated interest and merchant discount income. The interest rate originally charged Shoppers Charge cardholders was 1% per month on unpaid balances, but Pullman found the income generated insufficient and, in April 1961, the rate was increased to 1.5% per month. (*Id.*, at ¶ 3.) From 1963 through 1965, Pullman operated Chicago Area Charge Service, a charge card program owned by Pullman for the Chicago area E. J. Korvette stores, which had a monthly interest rate of 1.5%. (*Id.*, at ¶¶ 4-5.) Based on the successful experience with Chicago Area Charge Service, Robert E. Kennedy and W. Richard Murphy, two Pullman officers in charge of the Service, began to study the feasibility of expanding the Service into a general bank charge card in early 1966. (*Id.* at ¶ 7; W. Richard Murphy Dep. 12/8/72 at 11.) Kennedy and Murphy discussed the idea with Donald O'Toole, the chairman of the board, and Walter Ehrmann, the vice-

chairman. (Donald O'Toole Dep. 6/19/74 at 29; W. Richard Murphy Dep. at 15.) Based upon their prior experience in the charge card business, these officers decided that an interest rate of 1.5% would be charged for extended payment privileges; even at that rate, the group anticipated that the program would not become profitable for several years. (Robert E. Kennedy Aff. at ¶¶ 7-8; Donald O'Toole Dep. at 38; W. Richard Murphy Dep. at 22.) As W. Richard Murphy testified, the 1.5% rate was chosen.

> [b]ecause it was legal and you needed as much as you could get.
>
> • • •
>
> Of course, I know you are aware that in the small loan business, the interest rate has been high because you are dealing in small units.
>
> • • •
>
> [I]t costs us at Pullman just as much to lend you $2,300.00 to buy a Buick as it did to lend the XYZ Company $50,000.00 to buy a diesel tractor, and so when you start dealing in nickels and dimes, you have got to get [the highest] interest rate because of the fact that your administrative cost just kills you.
>
> (W. Richard Murphy Dep. at 22-23.)

Having decided to enter the charge card business and determined the interest rate, Pullman began recruiting other banks to participate in Illinois Bankcharge.[1]

(W. Richard Murphy Dep. at 17.)

As a correspondent of Continental, Harris and First, Pullman received mailings and information about the planned Midwest Bank Card System. (Donald O'Toole Dep. at 40, 42; *see* PTX 13.) On June 22, 1966, a Continental officer telephoned W. Richard Murphy to inform him that

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[1] Pullman's correspondent recruitment is discussed *infra* at 290.

Continental was about to issue its press release on the planned compatible card program. (PTX 5.) On August 11, 1966, Donald O'Toole had dinner with some Continental officers, who, having learned of the Pullman's plans, urged him to defer the start-up date. (Donald O'Toole Dep. at 60-64; PTX 78.) O'Toole declined to postpone announcement of the program, which was imminent, on the ground that the program reflected an enormous investment of shareholders' assets and the bank's plans were set. (Donald O'Toole Dep. at 62.) Nothing was discussed at that dinner meeting other than start-up dates. (*Id*, at 64.) Pullman announced its program on August 12, 1966 (PTX 10, 457.)

Despite its planned independent program, Pullman continued to discuss the possibility of entering the Midwest system with the other defendants. (*See, e. g.*, PTX 109, 379, 655, 656.) And Midwest members tried to recruit Pullman for correspondent participation in the various banks' programs. (W. Richard Murphy Dep. at 40-43.) On October 24, 1966, John Perkins of Continental told Walter Ehrmann about meetings at the American Bankers' Association convention concerning a nationwide bank charge card and Alfred Lindgren of Continental telephoned Ehrmann on October 31, 1966 to inform him that First had secured an account with the Illinois Restaurant Association. (PTX 109, 379.) Although Pullman initially rejected the overtures and continued developing its own program, it eventually found that the competition with the larger system, particularly in terms of merchant and participating bank recruitment, was too great and concluded that it would be to the bank's advantage to join Midwest as a card-issuing bank. (*Compare* W. Richard Murphy Dep. at 43 with *Id.* at 35, 41, 45-50; Robert E. Kennedy Dep. 7/2/74 at 146, 169, 173, 188, 191, 194-96.) As Murphy testified, Pullman got involved with Midwest "[b]ecause we were concerned about the fact

that we were going to have competing bank card systems. . . . And also, that we were a failure." (W. Richard Murphy Dep. at 35.) Murphy inquired about Midwest membership and was instrumental in persuading his superiors that Midwest membership was the best way to engage in the charge card business. (*Id.*, at 32; PTX 547.) In the late autumn of 1966, Pullman formally joined Midwest and executed the interim agreement of October 24, 1966 establishing the Midwest Bank Card System. (PTX 35, at 3; PTX 42.) Murphy became Midwest's president in 1967 and, as such, entertained the board of Midwest at least once and concerned himself with entry into the Interbank-Master Charge Association. (PTX 73, 117, 113, 704.)

C. Recruitment of Correspondent Banks by Central

Central, itself a correspondent bank of Continental and Harris, did not start recruiting any correspondent participation in its charge card program until early 1970. (Frank E. Bauder Dep. at 44; Lowel Taylor Dep. at 16-17; Robert Logan Dep. at 56; Frank L. Dwojacki Aff. 1/26/79 at ¶¶ 3-4; PTX 246, 248.) Central did not hold any large recruitment meetings; rather, it approached its correspondents slowly, on an individual basis. (Frank E. Bauder Dep. at 44; Robert Logan Dep. at 56.) During its first year of recruiting, less than a dozen of Central's 250 correspondents joined its program. (Frank L. Dwojacki Aff. at ¶ 5; Frank E. Bauder Dep. at 43.)

Central offered its correspondents a variety of ways to participate in its program, from merely furnishing customer names to Central for card-issuance to issuing their own cards. (Robert Logan Dep. at 56; PTX 84, 248.) The majority of correspondents chose not to issue their own cards and to have Central issue cards to their customers. (Robert Logan Dep. at 56.) Central's contracts with its

correspondents made no mention of cardholder interest rate and were terminable at will with notice. (PTX 317, ¶ 12.)

D. Recruitment of Correspondent Banks by Pullman

Pullman's relationship with its correspondent banks was more complicated than the other defendants' because Pullman itself is not precisely a card-issuing bank. Rather, it is one of six banks which formed a joint venture known as Illinois Bankcharge in 1966. Under the Participation Agreement constituting the venture, each bank owned a percentage of the program, although Pullman owned by far the largest share: 44%.[2] (Pullman's Trial Exhibit [hereinafter "Pullman TX"] C38, at 8.) Each bank contributed a percentage of the total amount needed to fund the enterprise and, in return, was entitled to a percentage of the cardholder interest income and merchant discount income generated by the program. The initial agreement which was executed on October 28, 1966 provided that if the cardholder elected to exercise his extended payment privileges, "a service charge of one and one-half per cent (1½%) per month or such other service charge as may be agreed upon by the Banks will be added." (Pullman TX C38, at ¶ 5.) The agreement was modified in March, 1967, after Illinois Bankcharge's entry into Midwest, but the contract modification specifically provides that the earlier service charge clause "shall remain in full force and effect." (PTX 309, at ¶ 2.) Throughout the program, Pullman was invested with primary responsibility for issuing cards and administering the program generally. (PTX 308, ¶¶ 2-7, 14-22;

[2] The other banks, and their ownership interests, were: County Bank and Trust Company (9%); Hyde Park Bank and Trust Company (14%); Olympia State Bank (5%); Standard Bank and Trust Company (19%); and the First National Bank of Lockport (9%). (PTX 38, at 8.)

PTX 309, ¶ 6.) For example, Pullman processed applications of the participants' customers and arranged for advertising, although the participants reimbursed Pullman for its expenses. (PTX 308, ¶¶ 4, 6.) Pullman held meetings in the summer of 1966 with its participants to discuss implementation of the program. (PTX 19.)

Besides its five joint venturers, Pullman recruited affiliates for Illinois Bankcharge. In the course of this recruiting, Pullman held meetings at which it discussed various aspects of the program, including the interest rate charged by Illinois Bankcharge. (Pullman's Ans. to Pl. Int. 6/23/71, Nos. 13, 30, 31.) The standard form contract executed by banks choosing to become affiliates provided for issuance of cards to their customers by Illinois Bankcharge directly so that no Illinois Bankcharge affiliate ever shared the credit risk. (PTX 310.) The agreement further provided that the affiliate would use its best efforts to encourage its merchant customers to accept Illinois Bankcharge. (*Id.*) It was terminable at will upon ninety days prior written notice. (*Id.*)

E. Recruitment of Correspondent Banks by Harris

Harris held at least two mass meetings in October and December of 1966 to recruit correspondents for its Charge-It program. (Harris Ans. to Pl. Int. March 1974 Nos. 20, 21.) At these meetings, terms and conditions of participation with Harris in the program were discussed, including estimates of project income and expenses which might be received or incurred by correspondents, and operational questions concerning the establishment of credit criteria, methods of handling collections, methods of dealing with security and fraud problems, and handling customer complaints. (*Id.*) Members of other card-issuing banks did not attend these meetings nor any other held by Harris with

its major correspondents to consider national or regional interchange and other issues in the charge card area. (*Id.*, No. 21.) Harris also supplied participating correspondents with promotional and informational material (PTX 209, 211.) And Harris paid for a limited amount of newspaper and bill-board advertising by correspondents in 1966 and 1967. (PTX 553, 560, 561.) Harris also provided "statement stuffers" to correspondents. (PTX 557, 559.)

Over the years, Harris has had various sorts of agreements with participating correspondents as to the manner in which a correspondent may take part in the Charge-It program. From the inception of the program in 1966 until January 1968, Harris purchased all of the cardholder receivables generated on the charge cards of its participating banks, assuming the full risk of loss, as well as collecting and retaining all receipts and any profit. (Culver Floyd Aff. 1/17/79 at ¶ 3; Harris Trial Exhibit [hereinafter HTX] B30, at § 1.2.) Early in 1968, Harris offered its correspondents the opportunity to share in profits and losses as to their respective receivables generated on their cards. (Culver Floyd Aff. at ¶ 3.) Thereafter, a new form of agreement was offered to the correspondents, which provided that the participating bank could establish any cardholder rate it might wish, but that should it establish a rate different than 1.5% and have Harris participate in a share of the receivables, it must provide for payment to Harris, on the latter's share of the receivables, out of collections, of a return equivalent to 1.5% per month. (HTX B28, § Alternative 1.5.) Later in 1970, Harris offered correspondents the "Bank Service Agreement" pursuant to which Harris would simply provide services to such correspondent in preparing and delivering the charge card to the correspondent's customer, accounting for receipts and collections with respect to both cardholders and merchants, performing

the interchange function and dealing with ministerial portions of serving the program for which Harris would be compensated on a specified fee schedule. (HTX B31.) The agreement specifically provided that the correspondent "is free to establish with its Cardholders any lawful periodic rate" which it chose. (*Id.*, at § 3.1.) Correspondents utilizing this Bank Service Agreement bear all risk of loss and do not share profits with Harris; Harris simply provides mechanical services to effectuate interchange and accounting. Finally, in late 1974, Harris formulated yet another program to offer to correspondents, similar to the one used by Continental. *See Weit* v. *Continental Illinois Nat. Bank & Trust Co.*, 467 F.Supp. at 202-04. Under this "Non-Card-Issuing Bank Agreement", Harris simply issues its charge card to those persons whose names are furnished by the correspondent, and Harris unilaterally determines the rate of interest which it would charge to its cardholders, because it, and not the correspondent, extends credit to the cardholder. (HTX B29; PTX 215, 229.)

Regardless of which program the correspondent elects, it may terminate the agreement upon 30 days' notice (HTX B28, § 7.2; B31, § 6; B29, § 3.3.) After any such termination, Harris "in order that Participant may make such new arrangements as it deems fit, continues service to Participant. . . ." (HTX B28, § 7.4; *see also* HTX B31, § 6; B29, § 3.3.)

II.

Central, Pullman and Harris argue that none of the documents and deposition testimony on which plaintiffs say they will rely at trial supports an inference of conspiracy among them or between each of them and their respective correspondents to fix the interest rate charged cardholders for extended payment privileges as alleged in Counts I

through IV of the third amended complaint.[3] Each defendant points to deposition testimony, affidavits and documentary evidence which, it argues, disclose that the interest rate each charged its customers was determined independently and not arrived at by agreement with each other or their respective correspondents.

In support of its motion for summary judgment, Central relies on the depositions of Frank E. Bauder, Robert Logan, and Lowell Taylor, its chief officers, as well as the affidavit of Frank L. Dwojacki, its vice-president in charge of retail banking. The depositions establish that Central was motivated to join Midwest by fear of an erosion of its customer base and that the decision to charge the maximum legal interest rate was made internally and based on the officers' independent determination that, even at that rate, the program would not be profitable initially. (Frank E. Bauder Dep. at 29, 42; Robert Logan Dep. at 31-33; Lowell Taylor Dep. at 60-61; *see* PTX 84, at 2.) Frank L. Dwojacki avers that Central did not agree with any of the correspondent banks that Central or its correspondents would charge 1.5% or any other rate of interest to cardholders. (Frank L. Dwojacki Aff. at ¶ 7.) None of the participation agreements offered by Central to its correspondents even mentions interest rate. (PTX 317.)

[1] In support of its motion,[4] Pullman relies on the affidavit of Robert E. Kennedy and the deposition testimony

[3] The allegations of horizontal conspiracy are: Count I, ¶ 17; Count II, ¶ 18; Count III, ¶ 18; Count IV, ¶ 19. The allegations of vertical conspiracy are: Count III, ¶ 18; Count IV, ¶ 19.

[4] The court notes that Judge McMillen denied an earlier motion for summary judgment by Pullman. (Decision, July 14, 1976, McMillen, J.) This earlier interim ruling does not bar reconsideration of such a motion, now that discovery has been completed and the case is in a posture for trial. *See* 1B Moore's Federal Practice ¶ 0.404[4], at 453-54 (2d ed. 1974).

of its chief officers. Kennedy avers that Pullman never considered a lower interest rate than the legal maximum, because of its past experience with Shoppers Charge and Chicago Area Charge Service. (Robert E. Kennedy Aff. at ¶¶ 7-8.) He also avers that no Pullman employee ever entered into an agreement regarding interest rates with any employee of its co-defendant banks. (*Id.* at ¶ 9(a).) The deposition testimony of Pullman's chief officers also suggests that the interest rate was determined independently on the basis of Pullman's prior experience and without regard to the conduct of its co-defendants. (*See, e. g.*, Donald O'Toole Dep. at 38; W. Richard Murphy Dep. at 22-23.)

Harris relies on documentary evidence and the affidavit of Culver Floyd, its Metropolitan Banking Officer, to support its motion. Floyd avers that, over the years and throughout the various programs implemented by the bank, Harris unilaterally set the interest rate it required with respect to the receivables it purchased under its Participating Bank Agreements (HTX B30, B28) or it generated through its unilateral extension of credit to correspondents' customers under its Non-Card-Issuing Bank Agreement (HTX B29). (Culver Floyd Aff. at ¶¶ 3-4,6-7.) And to the extent a correspondent assumed part or all of the receivables, it was free to set whatever lawful interest rate it wished, so long as Harris was reimbursed at a 1.5% rate as to that portion of the receivables it purchased, or, if none, so long as Harris' service fee was paid. (Culver Floyd Aff. at ¶¶ 4-5.) From the initiation of the program, as evidenced by its loss projections, Harris anticipated that a substantial portion of its income would be derived from receivables purchased from its correspondents, and that it must have a return of 1.5% per month on its receivables if it were to show any profit eventually from its Charge-It program. (*See* Harris Group Ex. 1 & 2.) At the same time,

Harris did not require its correspondents to agree on interest rates or to charge any particular rate, but only to compensate Harris at a rate calculated as equivalent to 1.5% per month with respect to Harris' risk participation; for themselves, correspondents could set whatever rate they chose.

[2] All defendants also argue that in light of this court's December 22, 1978 ruling, they are entitled to summary judgment on the ground that the named plaintiffs lack standing.[5] Defendants argue that plaintiffs, as Continental cardholders,[6] could not have been injured by any of these defendants' conduct and have no claim against these defendants following this court's determination that Continental did not conspire with either the other named defendants or any of its correspondents. Defendants also argue that the third amended complaint alleges two conspiracies: a primary horizontal one among the named defendants and a subsidiary vertical one by each defendant with its respective correspondents "to expand participation" in the various

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[5] The court notes that defendant Central has also filed a motion to dismiss in which the other defendants have joined, arguing that plaintiffs, as consumers, lack standing to sue under section 4 of the Clayton Act, 15 U.S.C. § 15, because they have not been injured in their "business or property" within the meaning of the Act. Since the filing of the motion, the Supreme Court has held that consumers who pay a higher price for goods purchased for personal use as a result of antitrust violations sustain an injury in their "property" within the meaning of section 4. *Reiter* v. *Sontone Corp.*, ____ U.S. ____, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979). Accordingly, Central's motion to dismiss, under Rule 12(b)(6), Fed.R.Civ.P., for lack of standing because of plaintiffs' consumer status, is denied.

[6] All the named plaintiffs received their cards through Continental's Town and Country program. (See Jack Weit, Dep. 9/28/70 at 16; Robert W. McClallen Dep. 10/15/70 at 8-9; James B. Cox Dep. 10/15/70 at 7.)

card programs. (Third Am. Comp., Ct. III, ¶ 18; Ct. IV, ¶ 19.) Therefore, defendants argue, once the court finds that no unlawful horizontal conspiracy exists among the named defendants, the ancillary vertical conspiracy charge must also be dismissed.

Plaintiffs oppose the motions on several grounds. As to all three defendants, plaintiffs insist, there remain issues of material fact as to whether they conspired with one another and with their correspondents to fix the interest rate charged cardholders for extended payment privileges. As to defendant Central, plaintiffs argue that its continuous contacts with its correspondents, Harris and Continental, placed it in the thick of the information flow at the commencement of Midwest. It received informational mailings from Harris and Continental and met with Pullman to review its program. (*See* Central Trial Exhibit [hereinafter CTX] D9, D11, D3; Robert Logan Dep. at 6-16.) Following its entry into Midwest, several Central officers became members of Midwest's standing committee and attended numerous Midwest meetings, and Central participated in some joint advertising with the other named defendants during the entry into Interbank. (*See* PTX 115, 116, 136, 488, 120, 204, 205, 698.)

Defendant Pullman likewise had numerous opportunities to conspire with its co-defendants, plaintiffs argue. Throughout the period that it developed Illinois Bankcharge, Midwest members solicited its participation in their various programs as a correspondent. (*See, e. g.*, PTX 109, 379, 655, 656; W. Richard Murphy Dep. at 40-43.) W. Richard Murphy and Walter Ehrmann maintained constant contact with the members of Midwest, attending mass meetings at which Harris, Continental and First gave presentations to publicize and recruit for their respective programs. (*See, e. g.*, PTX 5, 13.) And once Pullman joined Midwest,

plaintiffs urge, its opportunities to conspire increased because W. Richard Murphy became president of Midwest. (PTX 73.) Further, plaintiffs urge, Pullman's participation agreement establishing Illinois Bankcharge with its five correspondent joint venturers contains an explicit price-fixing agreement requiring the participants to impose upon cardholders "a service charge of one and one-half per cent (1½%) per month or such other service charge as *may be agreed upon by the Banks. . .*" (PTX 308, at ¶ 5; *see also* PTX 309, at ¶ 2.) (Emphasis added.) This agreement, plaintiffs urge, clearly evidences an unlawful conspiracy between Pullman and its five co-signatory correspondents in establishing the Illinois Bankcharge "subsystem" which ultimately was integrated into Midwest.[7]

As to Harris, plaintiffs urge that its mass recruitment meetings with correspondents in late 1966 provided an opportunity to fix interest rates. (Harris Ans. to Pl. Int. March 1974, Nos. 20, 21.) Its distribution of informational, educational, and promotional material at such meetings furnished a background against which to discuss projected income to correspondents from the Charge-It program—and to fix interest rates. (*Id.*, Harris Ans. to Pl. Int. 6-23-71 No. 30; PTX 209, 211.)

Finally, plaintiffs urge that, despite this court's ruling of December 22, 1978, they have standing to recover from the remaining defendants for their conspiracy with one

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[7] The court notes that, although Illinois Bankcharge was separately established prior to its entry into Midwest, it was not a functional entity when it joined the Midwest system. (W. Richard Murphy Dep. at 50-51.) As one Pullman officer testified:

> Q. Did [Illinois Bankcharge] operate under a different name prior to entry into the Midwest Bank Card System?
>
> A. No, we never really got operative basically. We were just starting to get things under way. (*Id.*)

another and their respective correspondent conspiracies. Plaintiffs urge that they are members, and adequate representatives, of a class of cardholders of all defendants because the compatibility feature of the Midwest and Interbank-Master Charge system necessarily harms all cardholders of the defendants when they purchase from any system-affiliated merchant. All cardholders are therefore, plaintiffs argue, within the "target area" of the alleged horizontal and vertical conspiracies.

III.

[3, 4] The legal principles governing the grant of summary judgment in an antitrust case are summarized in this court's earlier memorandum. *Weit* v. *Continental Illinois Nat. Bank & Trust Co.*, 467 F.Supp. at 208-09, and need not be repeated here. It is sufficient to state that once the defendants as moving parties meet their burden under Rule 56, Fed.R.Civ.P., and demonstrate that the facts on which the plaintiffs rely are not susceptible to the interpretation sought to be given them, plaintiffs must come forward and show the existence of significant probative evidence supporting the inference urged by them or face summary judgment dismissing the complaint. *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 289-90, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968); *Modern Home Institute, Inc.* v. *Hartford Acc. & Ind. Co.*, 513 F.2d 102, 109 n. 10 (2d Cir. 1975.) This case is further governed by the substantive antitrust rule that while proof of parallel business activity does not in itself establish a Sherman Act violation, it is circumstantial evidence from which an agreement may be inferred. *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. at 287-88, 88 S.Ct. 1575; *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 540-41, 74 S.Ct. 257, 98 L.Ed. 273 (1954); *Interstate*

Circuit, Inc. v. *United States,* 306 U.S. 208, 59 S.Ct. 467, 83 L.Ed. 610 (1939). However, such evidence, standing alone, "is insufficient unless the circumstances under which it occurred make the inference of rational, independent choice less attractive than that of concerted action." *Bogosian* v. *Gulf Oil Corp.,* 561 F.2d 434, 446 (3d Cir. 1977), *cert. denied,* 434 U.S. 1086, 98 S.Ct. 1280, 55 L.Ed2d 791 (1978).

[5] A. The Alleged Horizontal Conspiracy[8]

[6] The essence of plaintiffs' case as to Central and Pullman, as with Continental, Harris and American rests on evidence, which defendants do not contest, showing the universal adoption of identical cardholder interest rates which have not changed since the inception of Midwest. The deposition testimony of all of Central's and Pullman's officers, their answers to interrogatories, and documentary evidence show that Central and Pullman independently projected high initial costs and early losses; they independently determined that their respective programs required that the maximum legal interest rate be charged. The uncontradicted testimony of every bank officer consistently denies that interest rates were discussed among the named defendants, or that interest rates were consensually

[8] The standing of the class representatives to challenge the legality of the named defendants' conduct in Midwest and Interbank cannot be seriously doubted. As Continental cardholders, they would be affected by any unlawful conspiracy in which all named defendants participated. While the court's earlier ruling that Continental, Harris and American did not conspire among themselves or with the other named defendants is necessarily a determination that the other named defendants, Central and Pullman, did not conspire with Continental, Harris or American, the motions of Central and Pullman provide the court with another opportunity to review all of the evidence of contracts between Continental and the two movants and determine whether any issue of material fact precludes summary judgment.

determined. The plaintiffs' showing of parallel business behavior under these circumstances, where each bank faced identical business problems of large initial expense to which reasonable businessmen would respond in the same fashion, does not provide the basis for an inference of the conspiracy which plaintiffs allege.

Under these circumstances, the burden shifts to plaintiffs to come forward with significant probative evidence supporting the inference they urge, to show that the rate set was counter to the defendants' interests and coupled with a motive to enter into an agreement, to demonstrate a "plus factor" or face summary judgment dismissing the complaint. *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. at 289-90, 88 S.Ct. 1575; *Venzie Corp.* v. *United States Mineral Prod. Co.*, 521 F.2d 1309, 1314 (3d Cir. 1975); *Gainesville Utilities* v. *Florida Power & Light Co.*, 573 F.2d 292, 301 n. 13 (5th Cir.), *cert. denied*, 439 U.S. 966, 99 S.Ct. 454, 58 L.Ed.2d 424 (1978). To discharge this burden, plaintiffs rely on evidence of opportunity to conspire.

Plaintiffs point to the continuous contacts between Central, Pullman and the other named defendants as evidence of multiple opportunities to conspire. In the case of Central, its contacts as a correspondent of two of the early members of Midwest, Harris and Continental, its attendance at mass meetings held by its co-defendants at which group presentations were made of the interchange system, and its participation as an active member of Midwest's standing committee, after it joined, all offer the basis for an inference of conspiracy. Likewise, in the case of Pullman, plaintiffs argue that its attendance at mass recruitment meetings held by Harris, Continental and First, at the same time as it was recruiting for its planned Illinois Bankcharge, as well as its participation as a Midwest member thereafter,

lead to an inference of conspiracy. But this heavy reliance on the various organizational and recruiting meetings cannot raise an issue of material fact, because plaintiffs have confronted every person who attended those meetings, examined the minutes of and documents generated by those meetings, and found no evidence which affirmatively supports their theory.

[7] The evidence shows that both Central and Pullman entered the charge card business and set the cardholder interest rate for independent, individual reasons. Central determined to offer a charge card service in order to preserve its customer base. It chose to issue cards through Midwest because it was not large enough to enter the business separately. The bank's officers assumed that a rate of 1.5% per month would be charged, because they had been advised by counsel that 1.5% per month was the legal maximum, and Central's independent study indicated that, even at that rate, the program would not be profitable initially. An internal memorandum prepared by Frank E. Bauder regarding Central's entry into the Midwest Bank Card System recognizes the difficulties faced by the Central Card program:

> Our posture will be basically a defensive one in [all] customer areas and the plan used as an offensive tool, if at all, in the Personal Banking area. It seems highly unlikely that we can effectively out-do competition in either the Merchant or Correspondent Bank area, and sheer costs may prohibit us from aggressively merchandising the plan to the public.
>
> We will be competitive as to rates and terms, but we will not cut prices in hopes of further penetrating the market.
>
> We must minimize our commitment to management time and marketing costs to cover direct cost of the

> plan as soon as humanly possible. We will make every effort to minimize credit losses.
>
> • • •
>
> Immediate action [on card-issuance criteria and procedures] may substantially reduce our initial loss experience.... (PTX 84.)

The deposition testimony of Central's officers consistently denies the existence of conspiracy and indicates that, even charging the maximum legal rate, initial credit losses and high start-up costs would make the program unprofitable for some time. (*See* Frank E. Bauder Dep. at 28-29, 42; Robert Logan Dep. at 31-33; Lowel Taylor Dep. at 60-61.)

As to Pullman, the evidence shows that its officers independently selected an interest rate of 1.5% per month on the recommendation of W. Richard Murphy and Robert E. Kennedy who had administered Pullman's earlier charge card program, Chicago Area Charge Service. The deposition testimony of Pullman's officers suggests that no other rate was ever considered, as Pullman's experience established that administrative costs were too high for the bank to consider charging less. (W. Richard Murphy Dep. at 22-23; Robert E. Kennedy Aff. at ¶¶ 7-8; Donald O'Toole Dep. at 38.)

[8] Both defendants have offered sworn denials of the existence of any conspiracy and a persuasive rationale for their parallel conduct which is consistent with their individual interests and with competitive, independent behavior. Under these circumstances, an inference of conspiracy from the evidence of opportunity to conspire would be illogical. The evidence of opportunity to conspire cannot alone bar summary judgment, since "[i]f the most that can be hoped for is the discrediting of defendants' denials at trial, no question of material fact is presented." *Modern Home Institute, Inc.* v. *Hartford Acc. & Ind. Co.*,

513 F.2d at 110. "Facing the sworn denial[s] of the existence of conspiracy, it [is] up to plaintiff[s] to produce significant probative evidence by affidavit or deposition that conspiracy existed if summary judgment [is] to be avoided." *Lamb's Patio Theatre* v. *Universal Film Exchanges*, 582 F.2d 1068, 1070 (7th Cir. 1978). Plaintiffs have failed to produce such evidence. And a review of all the evidence regarding the entry of Central and Pullman into the Midwest Bank Card System and, later, into the Interbank-Master Charge Association only confirms the conclusion reached by this court in its memorandum of December 22, 1978:

> whether viewed as a failure to produce significant probative evidence tending to support the complaint, or evidence of action contrary to their economic interests and of motivation to conspire, or evidence of a "plus factor" plaintiffs have failed to rebut defendants' showing that the complained of conduct was the product of independent business decisions rather than conspiracy. Under these circumstances, defendants' motions for summary judgment as to the horizontal conspiracy allegations of the complaint must be granted.
>
> *Weit* v. *Continental Illinois Nat. Bank & Trust Co.*, 467 F.Supp. at 214.

B. The Alleged Vertical Conspiracy

Because the court has determined that all named defendants independently set their cardholder interest rate policies based upon considerations of a nonconspiratorial nature, the issues of plaintiffs' standing to press a claim concerning the various banks' relationships with their respective correspondents and of the viability of a claim concerning the subsidiary vertical conspiracy are raised. Named plaintiffs and class representatives, Weit, McClannen and Cox, are Continental cardholders, and their only nexus to any Harris, Central or Pullman cardholders is

in the event that the rates charged to Harris, Central Pullman and Continental cardholders are affected by an unlawful conspiracy in which such banks participate. Since this court has found no unlawful conspiracy between such banks, neither the named plaintiffs themselves, nor any class to which they belong, has suffered any injury on the part of Harris, Central or Pullman, and there is no common question of fact with regard to the remaining defendants.

Plaintiffs urge that the compatibility feature of Midwest and Interbank necessarily harms all cardholders of all defendants when they purchase from any system-affiliated merchant. The compatible card system, plaintiffs argue, is the vehicle by which the price-fixing conspiracy is maintained, so any "sub-system" fix harms all compatible cardholders, as they are all within the "target area" of the conspiracy.

[9] The "target area" concept of anti-trust standing has been interpreted, in this circuit, to confer standing on all persons who, with reasonable foreseeability, would be affected by the anticompetitive conduct. *See Lupia* v. *Stella D'Oro Biscuit Co., Inc.*, 586 F.2d 1163, 1168-69 (7th Cir. 1978), *cert. denied*, 440 U.S. 982, 99 S.Ct. 1791, 60 L.Ed.2d 242 (1979); *see also In Re Multidistrict Vehicle Air Pollution M.D.L. No .31*, 481 F.2d 122, 127-29 (9th Cir.), *cert. denied*, 414 U.S. 1045, 94 S.Ct. 551, 38 L.Ed.2d 336 (1973); *see generally*, Lytle & Purdue, Anti-trust Target Area Under Section 4 of the Clayton Act: Determination of Standing in Light of the Alleged Antitrust Violation, 25 Am.U.L.Rev. 795, 802-07 (1976). While the relationship between the requirements of "standing" and "antitrust damages" remains somewhat unclear,

> [I]t would appear the circuits all view the treble damages suit as too lethal a cannon to put in the hands

of anyone who has suffered only an "indirect," "secondary," or "remote" injury.

Lupia v. *Stella D'Oro Biscuit Co., Inc.*, 586 F.2d at 1168.

[10] The Court cannot conclude that the compatible features of the charge card system are connected with any conceivable antitrust claim, as plaintiffs now argue, that would allow three Continental cardholders to press a claim against Harris, Central and Pullman for alleged injuries done to Harris', Central's and Pullman's cardholders under circumstances where the court has already found that each of those banks set its rate independently. Moreover, the compatible features of the Midwest and Interbank systems are merely procedures for the interchange of sales slips which are generated at merchant places of business, and the various regulations of the systems relate to the mechanization of the interchange system. There is no connection between the operations of the interchange system and the charges any particular bank makes to its cardholders for the use of extended payment credit. The "target area" of any conspiracy between Harris, Central, Pullman and their respective correspondents can only be those persons to whom Harris, Central, Pullman or their correspondents issue bank charge cards. Named plaintiffs are not such persons; they could not have suffered any damage as a result of any such conspiracy; and they cannot represent any class of persons holding cards issued by Harris, Central or Pullman or their respective correspondents.

The court further notes that the allegations of this suit have been consistently viewed by all parties and another judge of this court as charging a vertical conspiracy which was an aspect of the horizontal conspiracy, although such vertical conspiracy would also be a separate Sherman Act violation. The relevant counts of the third amended complaint allege that the named defendants and their corre-

spondents "combined and conspired . . . to expand bank participation . . ." in Midwest and Interbank. (Third Am.Comp.Ct. III, ¶ 18; Ct. IV, ¶ 19.) And plaintiffs have characterized the conspiracy between any named defendant and its correspondents as "an integral part of the comprehensive scheme that has succeeded in maintaining the same cardholder interest rate for 13 years" because "[t]he named [d]efendants could not have maintained their horizontal conspiracy unless each 'sub-system' avoided competition." (Pl.Br. in Opp. to the Mo. of Def. Harris for Summary Judgment 2/20/79, at 5.) Judge McMillen has held that proof of a conspiracy between a defendant bank and its correspondents would be evidence of a conspiracy between the defendant banks pursuant to Rule 404, Fed. R.Evid. (Decision, June 14, 1977, McMillen, J.) Further, only one class was certified on Counts I through IV. *See Weit* v. *Continental Illinois Nat. Bank & T. Co. of Chicago*, 60 F.R.D. 5 (N.D.Ill.1973). The court concludes from all these facts that the remaining vertical claims must fall because the basis for their existence, the allegation of a conspiracy among the named defendants, can no longer be maintained in light of this court's ruling of December 22, 1978.

[11] Even assuming that plaintiffs have standing to challenge the alleged subsidiary vertical conspiracy and that such a challenge does not fail since the primary, horizontal conspiracy has been found not to exist, Harris and Central are still entitled to summary judgment, although Pullman has not demonstrated the absence of any issue of material fact as to its relationship with its five joint venturers in Illinois Bankcharge. As to Harris and Central, plaintiffs argue that the recruitment of correspondents—in Harris' case, at mass meetings, in Central's case, on an individual basis—provided an opportunity to conspire which gives rise to an inference of conspiracy. But evidence

of opportunity to conspire is insufficient, standing alone, to bar summary judgment where, as here, both Harris and Central have offered sworn denials of the existence of conspiracy and there is no affirmative evidence that the dissemination of interest rate information to correspondents solicited to participate in the banks' program ever rose to the level of agreement.

As to Central, the evidence shows that its correspondents were offered a variety of ways to participate in its program, from issuing their own cards to simply providing customer names to Central for card-issuance. The agent contract offered correspondents by Central contained no mention of cardholder rate and was terminable, with or without cause, upon 90 days' notice. (PTX 317). As to Harris, the variety of participation arrangements available to its correspondents suggests that it did not conspire with them to fix interest rates, for only to the extent that Harris owned the receivables did it set the interest rate. (HTX B28-B31.) Where Harris owned the receivables, of course, it had a right to determine the interest rate charged customers because it, and not the correspondent, bore the risk of loss for the extension of credit. Consistent with its loss projections, Harris always required a 1.5% per month return as to that portion of the receivables that it purchased. However, all correspondents were free to set any lawful rate they wished, so long as Harris' return on its receivables remained 1.5% per month. Under these circumstances, it cannot be said that there is any issue of material fact that Central and Harris unilaterally determined the interest rate to be charged where they bore the risk of loss, but did not fix interest rates with those correspondents who chose to participate in their programs.

[12] As to Pullman, the situation is different, for plaintiffs urge not only that correspondent recruitment offered

an opportunity to conspire, but that the Illinois Bankcharge program's Participation Agreement contains an explicit price-fixing clause which bars the grant of summary judgment. The court agrees that the Participation Agreement is a "plus factor" which, had plaintiffs standing to raise it, would bar the entry of summary judgment. The agreement explicitly provides that the joint ventures of Illinois Bankcharge will impose upon cardholders "a service charge of one and one-half per cent (1½%) per month or such other service charge as may be agreed upon." (PTX 308, at ¶ 5.) Pullman does not dispute that the provision sets a common price, but urges rather that it does not compete with the other members of Illinois Bankcharge and that the agreement simply established the interest rate on a single bank card which the signatory banks were able to establish collectively. It may well be that Pullman could establish this fact at trial. However, the evidence adduced by plaintiffs affords some basis for the inference that Pullman and its five correspondents prevented the development of price competition between them and diluted the market by entering into a partnership that set a fixed price on the privilege of extended payments for cardholders. But this evidence will not bar the grant of summary judgment as to Pullman because, as was discussed earlier, the named plaintiffs could not have been injured by any conspiracy between Pullman and its correspondents and lack standing to raise any claim against Pullman.

For these reasons, the motions of Central National Bank in Chicago and Pullman Bank and Trust Company for summary judgment on both the horizontal and vertical conspiracy allegations of Counts I through IV are granted; the motion of Harris Trust and Savings Bank for summary judgment on the vertical conspiracy allegations of Counts II through IV is likewise granted. This suit is dismissed in its entirety.

So ordered.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JACK WEIT, JAMES B. COX and ROBERT W. McLALLEN, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, a corporation, et al.,

Defendants.

No. 70 C 1926

DECISION ON MOTION FOR SUMMARY JUDGMENT OF DEFENDANT AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO

The defendant American National Bank and Trust Company of Chicago has filed a motion for summary judgment on Counts II, IV and VI of the Third Amended Complaint. These are the only counts involving this defendant, and its theory is that no plaintiff has adduced any evidence against it. We find and conclude that the defendant's motion should be denied as to Count II but granted as to Counts IV and VI.

Count II alleges a conspiracy to fix the rate of interest on Mastercharge accounts at 1.5% a month by use of Interbank-Mastercharge, Inc., in violation of Sec. 1 of the Sherman Act. Although this defendant did not adopt a Mastercharge system until April 16, 1969, it had an observer at the earlier meetings of the other defendant banks on various occasions and knew many details of their pro-

grams. When it initiated its program, using the services of a former Continental Illinois National Bank employee, it adopted substantially the same interest rate as the other defendant banks, although the method of computing varied technically from bank to bank. Finally, when the defendants joined Interbank-Mastercharge, Inc. in January, 1970, all adopted a new and uniform interchange fee.

All of these facts constitute sufficient circumstantial evidence that American National Bank participated in the conspiracy alleged in Count II. On a defendant's motion for summary judgment, the evidence supporting the complaint must be viewed in the light most favorable to the plaintiff, just as it would be on a motion for a directed verdict at the close of the plaintiff's case. If the defendants fixed the 1.5% interest charge collusively, this is a *per se* violation of Sec. 1, under such decisions as *United States* v. *Trenton Potteries*, 273 U.S. 392 (1926), and defendant has not shown a sufficiently conclusive defense to preclude a genuine issue of material fact. *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962).

This case at bar is distinguished from *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253 (1968) where plaintiff was left with nothing more than evidence of conscious parallelism, and defendant rebutted the inferences from this circumstantial evidence with a logical and persuasive defense. Furthermore the *Cities Service decision* is almost *sui generis*, and we find and conclude that the inferences in the case at bar are for the jury.

Count IV alleges that defendant's unnamed correspondent banks participated in the alleged conspiracy to fix interest rates on Mastercharge accounts. Defendant's affidavit categorically denies this, by stating that "none of American's correspondents . . . has participated in any manner in the setting of American's interest rate . . ." Although the balance of the sentence from which the foregoing is quoted seems to miss the substance of Count IV, the allegation of this Count are no more specific than the affidavit. We deem

it appropriate to construe the apparent ambiguity of Count IV against the pleader and find that defendant has sustained its burden of piercing the allegations of the complaint by filing an affidavit in the language of the complaint which has not been contradicted.

The participation in the alleged conspiracy between American and its correspondents is at most the kind of innocent parallelism found to be unavailing to a plaintiff in the *Cities Service* case, *supra* p. 3. In civil as well as criminal conspiracies, mere association does not constitute illegal activity. Whether the correspondent banks become defendants to Count IV as members of a class remains to be seen. The allegation that the defendant American National Bank and Trust Company of Chicago participated in a conspiracy with its correspondents has been overcome, however, and no genuine issue of material fact remains on Count IV as to this defendant.

Count VI is not a proper class action. No plaintiff holds a Mastercharge card from this defendant. Plaintiff McLallen has an adequate and complete remedy on this Count against his issuing bank without the presence of American National Bank. The allegation that the activities of other persons may have caused merchants to raise their retail prices is too remote and minimal to constitute a genuine issue of material fact against this defendant or to justify granting any equitable relief against it.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the motion of the defendant American National Bank and Trust Company of Chicago for summary judgment is granted on Counts IV and VI of the Third Amended Complaint, and the defendant's motion is denied as to Count II.

ENTER:

Thomas R. McMillen
Judge, U. S. District Court

dated; June 10, 1974

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JACK WEIT, et al.,
Plaintiffs,

v.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, et al.,
Defendants.

No. 70 C 1926

DECISION ON MOTION FOR SUMMARY JUDGMENT OF PULLMAN BANK AND TRUST COMPANY, DEFENDANT

The Pullman Bank and Trust Company has filed a motion for summary judgment, supported by the affidavit of one of its officers who was personally active in establishing this defendant's credit card operation under the Illinois Bankcharge Credit Card Program. Plaintiff has filed no counteraffidavids but relies on (1) the fact that members of the class have not yet been notified of this action pursuant to *Peritz* v. *Liberty Loan Corp.*, 523 F.2d 349 (7th Cir. 1975), and (2) sworn statements in depositions and answers to interrogatories which are on file in this case.

The question of notification has now been settled by the Court of Appeals in this case so that the plaintiffs can proceed with this requirement before any judgment becomes final (7th Cir. Cases 74-1658, -1659, and 75-1079 decided May 17, 1976). Even if F.R.C.P. 60(b) did not afford relief to an unnotified member of the plaintiff class after we decide defendant's motion, we could suspend the effective-

ness of any judgment for a reasonable period of time in order to give plaintiffs an opportunity to send out the notice, (see *Peritz*, 523 F.2d at p. 354). Furthermore, for the reasons stated in our opinion dated January 26, 1976 in *Eovaldi* v. *First National Bank of Chicago*, 71 C 1654, we believe that the certification of a class in this case is probably all that is required even under *Peritz* and that it is the defendant rather than plaintiffs which would suffer prejudice if prior notification is not required. Defendant does not seek notification prior to decision of its motion.

On the merits, we find that genuine issues of material fact exist on Counts I through IV of the Third Amended Complaint. Although the defendant's affidavit categorically denies any acts which would give rise to liability against it on these counts, the record is replete with evidence of meetings and communications between this defendant and the other defendants during the defendants' credit card operation. See, for example, plaintiffs' Exhibits 6, 8, 71, 72, 78, 107, 111, 149, and 166, Perkin's Deposition, p. 30, Miller Deposition pp. 94-5, Martindale Deposition, p. 87. Some of this activity occurred before this defendant began its credit card operation on November 7, 1966.

Although the foregoing documents do not necessarily prove a conspiracy, the inferences and the issue of credibility implicit in the plaintiffs' evidence cannot be resolved on a motion for summary judgment, in our opinion. See *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 540-1 (1954).

Also, some of the actions of the defendant after the credit card systems were inaugurated can give rise to an inference of conscious parallelism which, even standing alone, could be sufficient to sustain a criminal conviction. *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208 (1939). We

realize that the inferences which may be drawn from parallel conduct can be rebutted. They are particularly strong, however, when accompanied by the plaintiffs' evidence of meetings between the defendants subsequent to the inauguration of the plan. The discussion of interest rates was not necessarily proscribed in the meetings, and there is at least a reasonable inference that the motivation of the defendants was not so diverse as it was found to be in *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 286 (1968).

The issues are quite different in Counts V and VI, however, which involve the relationship between the defendants and their customers who participate as merchants in the credit card system. Defendant's affidavit categorically denies any elements of conspiracy with respect to the merchant discounts which it charged to its customers and has affirmatively stated that these rates are arrived at "by vigorous competition". Plaintiffs' Exhibit 272 tends to support this argument, and plaintiffs admitted as much in their brief in the Court of Appeals, at p. 13. They have shown no parallelism in the merchant discount rates charged by the defendants and have pointed to no documents or other sworn statements from which inferences of conspiracy in this area could reasonably be drawn.

Plaintiffs also rely upon the allegation that the defendants required their customers and correspondent banks to maintain "static accounts" on which no interest was paid but which the defendant banks could use as reserves against loans. Here again, the defendant's affidavit categorically denies the existence of any such accounts or any conspiracy on its part in this practice. Plaintiffs have supplied no evidence, either direct or circumstantial, to the contrary. The letter from the Vice President of the First National Bank of Chicago (not a defendant) to Pullman, after Pull-

man had already announced its program, cannot be grounds for holding this defendant to trial on Counts V or VI.

We believe the language of the Supreme Court in *First National Bank of Arizona*, supra, applies to Counts V and VI when it stated at 391 U.S. p. 290:

> While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint, setting forth a valid cause of action, be entitled to a full dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the motion of the defendant Pullman Bank and Trust Co. for summary judgment on Counts V and VI of the Third Amended Complaint is granted as to this defendant, and its motion for summary judgment on Counts I through IV is denied.

ENTER:

Thomas R. McMillen
Judge, U. S. District Court

DATED: July 14, 1976

STATUTES AND RULES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal . . . ."

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without

supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt. (As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963.)

Office Supreme Court, U.S.
FILED
AUG 7 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-152

In the Supreme Court of the United States

OCTOBER TERM, 1981

JACK WEIT, JAMES B. COX, and ROBERT W. McLALLEN, on behalf of themselves and all others similarly situated,

Petitioners,

v.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, HARRIS TRUST AND SAVINGS BANK, PULLMAN BANK AND TRUST COMPANY, CENTRAL NATIONAL BANK IN CHICAGO and **AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO,**

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

In this private antitrust case, petitioners alleged that the respondent banks had conspired to fix the interest rates that they charged to their respective credit card holders for deferred payment privileges. Concluding that there was no significant probative evidence of any conspiracy to fix interest rates, the district court granted summary judgment for the banks. The judgment was affirmed by the court of appeals, with one judge dissenting.

The question presented to this Court is whether the court of appeals, in analyzing the particular record in this case, properly applied the principles governing summary judgments reiterated by this Court in *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253 (1968), in determining that the petitioners had submitted no significant probative evidence of conspiracy involving the banks. A subsidiary aspect of this question is whether the court of appeals properly dealt with two evidentiary issues raised by petitioners relating to certain lobbying activities of the banks and to an affidavit submitted by petitioners' economist.

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No. 81-152

In the Supreme Court of the United States

OCTOBER TERM, 1981

JACK WEIT, JAMES B. COX, and ROBERT W. McLALLEN, on behalf of themselves and all others similarly situated,

Petitioners,

v.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, HARRIS TRUST AND SAVINGS BANK, PULLMAN BANK AND TRUST COMPANY, CENTRAL NATIONAL BANK IN CHICAGO and AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STATEMENT OF THE CASE

Introduction

This case was initially filed in 1970 by a charge card holder of respondent Continental Illinois National Bank and Trust Company of Chicago ("Continental Bank"), a founding member of the Midwest Bank Card System, Inc. ("Midwest"), which was a predecessor of the Mastercharge (now MasterCard) bank credit card system. The original plaintiff, later joined by two other Continental Bank cardholders (the three petitioners here), alleged various violations by the

respondent banks of Section 1 of the Sherman Act, 15 U.S.C. § 1. The specific question upon which review is sought in this Court is whether petitioners, in opposing the banks' motions for summary judgment, presented significant probative evidence to support their allegations that the banks conspired to fix the rate of interest charged for extended payment privileges available to holders of bank credit cards at 1½% per month or 18% per year.

Subsequent to the filing of the complaint, petitioners conducted virtually unlimited discovery for several years, including at least 71 depositions, 297 interrogatories, 128 requests for admissions, and innumerable document production requests. 467 F. Supp. at 208 (Pet. App. B-26-27).* In 1978, in an answer to interrogatories propounded by Continental Bank, petitioners identified some 964 documents and 53 witnesses (many of whom were present or former employees of the banks) which would be offered or presented at trial to support their allegations of unlawful conspiracy. *Id.* At this point the banks moved for summary judgment, contending that there was nothing in petitioners' designated evidence that rose to the level of significant probative evidence of a conspiracy to fix interest rates.

When the district court decided the motions for summary judgment,** all of petitioners' documents and the lengthy depositions of substantially all of petitioners' witnesses were

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*The "Pet. App." citations are to the Appendix attached to the Petition for Certiorari.

**The Petition notes that, prior to the time that Judge Leighton granted the present motions for summary judgment, Judge McMillen had denied prior motions made by two of the banks. Petition, pp. 4-5; Pet. App. D-1, E-1. Petitioners fail to reveal that these interim rulings were made in 1974 and 1976 prior to the time that critically important discovery had occurred, including the petitioners' answers to Continental Bank's interrogatories which defined with specificity the evidence upon which petitioners intended to rely at trial to support their conspiracy allegations.

before that court; they were also before the court of appeals on review. In this extensive collection of discovery materials, petitioners could point "to only two instances where interest rates were even discussed, and then only in the context of state usury laws, or the rate that Bank Americard was charging." 641 F.2d at 464 (Pet. App. A-18-19).*

Background of the Case

As the Petition correctly states (p. 3), the basic facts of this case are not disputed. However, the factual summary contained in the Petition is so misleading in its brevity and partiality that a more complete and accurate statement is required.

In 1966, various banks in Chicago decided to establish a compatible charge card system in which a credit card issued by any one of the banks could be used for purchases from merchants who had a contract with any bank that was a member of the charge card system. A compatible system is designed to simplify the administration of a charge card program. If each bank issued its own separate non-compatible credit card, each merchant would have to accept many cards issued by different banks and then look to each individual bank for payment. Customers would have to seek out merchants willing to accept the particular bank card carried by the customer. With a compatible system, any merchant can accept the card of any member bank, but need deal only with his own bank to collect payment for purchases made. Customers, in turn, may deal freely with any merchant participating in the compatible charge card program. *See generally* 641 F.2d at 459 (Pet. App. A-6); 467 F. Supp. at 216-17 (Pet. App. B-44-46).

In launching the new credit card venture in the fall of 1966, the banks were each faced with the problem of large

*These two instances are quoted in the district court's initial opinion. 467 F. Supp. at 200, 211-12 (Pet. App. B-8, 33-34).

initial expenses. Several of the banks conducted independent internal studies each of which concluded that, even with an interest rate of 1½% per month (a rate commonly charged at that time by other consumer credit card issuers such as gasoline companies and retail establishments offering their own credit), the bank would sustain substantial losses for a period of years on its credit card operations. 641 F.2d at 461 (Pet. App. A-10-11); 467 F. Supp. at 201-202, 204-206 (Pet. App. B-10-12, 17-18, 20-21); 478 F. Supp. at 288-89 (Pet. App. C-8-10).

In establishing the compatible charge card system, the banks were acutely aware that antitrust questions could arise if they agreed among themselves upon the interest rates that they would charge their respective customers for deferred payment privileges. Thus, the banks employed antitrust counsel to assist them in establishing the charge card system. Counsel monitored the meetings of the study group planning the compatible system to ensure compliance with the antitrust laws. Moreover, a comprehensive memorandum was directed by counsel to "All Bank Personnel," limiting discussions with other banks to the exclusive subject of "planning a compatible credit card system," and specifically forbidding any discussion "even in jest" of "fees, discounts, billing and extended credit terms." 641 F.2d at 460 (Pet. App. A-8).

In 1966, the State of Illinois did not have a statute that expressly regulated the maximum interest rate that could be charged in connection with credit cards. The general Illinois usury rate was 7% per year; on installment loans, a lender, subject to certain requirements, was permitted to charge an additional 7% "add-on." Ill. Rev. Stat. 1965, ch. 74, §4a(a). Continental Bank and the First National Bank of Chicago, an alleged co-conspirator but not a defendant, independently inquired of the United States Comptroller of the Currency and received separate opinions indicating that the national

banks could charge interest rates that did not exceed those permitted to licensees under the Illinois Consumer Finance Act, Ill. Rev. Stat. 1965, ch. 74, §§ 19 *et seq.*, or an overall effective interest rate of approximately 1½% per month. 641 F.2d at 460-61 (Pet. App. A-9-10); 467 F. Supp. at 201 (Pet. App. B-11). Central and Pullman likewise concluded that 1½% per month was the maximum rate permissible. 478 F. Supp. at 288-89 (Pet. App. C-8-10). Nevertheless, there were no Illinois judicial decisions which sanctioned this interpretation of Illinois law.

A number of bills were introduced in the 1967 session of the Illinois General Assembly to regulate various aspects of credit card operations, including a bill that would have limited interest on charge cards to 1% per month, a bill that would have prohibited the mailing of unsolicited credit cards, and a bill that provided for a maximum monthly interest rate of 1½%. 641 F.2d at 461 (Pet. App. A-9-10). Mr. William R. Dillon was employed by Midwest early in 1967 to represent the interests of the banks in the Illinois legislature with respect to these and other bills. During its 1967 session, the Illinois General Assembly passed a measure which imposed a maximum interest rate of 1½% per month upon revolving credit arrangements. *Id.* That statutory provision, Ill. Rev. Stat. 1979, ch. 74, § 4.2, remained in effect from its enactment in 1967, although the Illinois legislature has recently passed a bill which would eliminate the interest rate ceiling.

In opposition to the banks' motions for summary judgment, petitioners submitted the affidavit of Dr. Bernard Shull. The affidavit makes various assertions concerning the alleged oligopolistic nature of the Chicago banking market and describes certain background details concerning the charge card program in which the banks were participants. It does not aver that the interest rates charged by the banks were the result of an unlawful price-fixing conspiracy. Rather, based upon his descriptions of the Chicago banking com-

munity and his outline of the various elements of the compatible charge card system, Dr. Shull concluded that "conscious cooperation" on the part of the Midwest members was the likely cause of the 1½% per month interest rate. 641 F.2d at 460 (Pet. App. A-9).

The Decisions Below

Based upon its review of the entire record, the district court concluded that, in light of the banks' business explanations for the interest rates that they had set and their consistent sworn denials of conspiratorial activities, the petitioners were required to come forth with significant probative evidence of conspiracy in order to defeat the banks' motions for summary judgment. The district court, holding that the petitioners had presented no such evidence, concluded:

> "[D]efendants' affidavits, deposition testimony, answers to interrogatories and documentary evidence show that Continental, Harris and American independently projected high start-up costs and early losses; they independently determined their respective programs required that the highest interest rate legally permissible be charged. The uncontradicted testimony of every bank employee consistently denies that interest rates were discussed among the alleged co-conspirators, or that interest rates were consensually determined. The showing of parallel behavior under these circumstances, where each bank faced identical problems of fraud, credit losses, and large initial expense to which reasonable businessmen would react in the same fashion, does not provide a basis for the inference of the conspiracy which plaintiffs allege." 467 F. Supp. at 210-211 (Pet. App. B-31).

The district court reached similar conclusions with respect to Central and Pullman. 478 F. Supp. at 295 (Pet. App. C-23-24).

The court of appeals also reviewed the entire record. The majority opinion stated that "[b]ased on our review of the record we, too, conclude that [petitioners] are unable to

point to any significant probative evidence in support of the allegations in the complaint." 641 F.2d at 458 (Pet. App. A-4-5).* Petitioners' petition for rehearing was denied, and no judge in regular active service requested a vote on petitioners' suggestion that the case be reheard *en banc.* (Pet. App. A-54.)

REASONS FOR DENYING THE WRIT

This case is wholly unremarkable, apart possibly from the length of time available to petitioners to attempt to uncover through the discovery process any significant probative evidence of conspiracy. It is totally devoid of any unusual or novel issues of law.

Indeed, the district court, the court of appeals' majority, and the dissenting judge were all in accord as to the interpretation of the applicable legal principles. Thus, all of the judges in the courts below were in agreement that the evidence, including the banks' business explanations for setting their interest rates as they did and their denials that they had engaged in a conspiracy to fix interest rates, was sufficient, under Rule 56 of the Federal Rules of Civil Procedure, to shift the burden to petitioners to produce significant probative evidence to support the allegations of their

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*The dissenting judge agreed with the majority that summary judgment was properly granted with respect to American National Bank. 641 F.2d at 480 (Pet. App. A-52). He pointed out, among other things, that by the time American issued its charge card in the spring of 1969, approximately 2½ years after the other banks (467 F. Supp. at 204 (Pet. App. B-16)), "the 18% credit card interest rate legislation had been in effect for two years" and "[e]very other bank seemed firmly set in its pattern of charging an 18% interest rate." 641 F.2d at 480 (Pet. App. A-53). The dissent also noted that American "did not participate in the lobbying activities with other defendants." *Id.* (Pet. App. A-52). The Petition does not challenge these facts or the unanimous decision of the panel as to American, and therefore American does not believe that petitioners seriously seek review of this case as it pertains to American.

complaint, and that, in order to infer the existence of a price-fixing conspiracy, petitioners had to come forth with evidence of more than merely parallel business conduct. *E.g.*, 467 F. Supp. at 208 (Pet. App. B-26); 641 F.2d at 462 (Pet. App. A-12-13) (majority opinion); *id.* at 475 (Pet. App. A-41) (dissenting opinion). These principles are fully in accord with the decisions of this Court. *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 289-90 (1968); *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 541 (1954).

In addition, the district judge and all three judges in the court of appeals (including the dissenting judge) agreed that the underlying issue in this case is whether, on this record, petitioners had presented significant probative evidence to permit the factfinder rationally to infer that the interest rates resulted from a conspiracy, rather than from independent business decisions by the respective banks. Both of the courts below concluded that the record in this case is devoid of significant probative evidence of conspiracy.

Petitioners now seek to have this Court review the record once again to determine whether indeed it contains any significant probative evidence of conspiracy involving the banks. But this is surely a wholly insufficient reason to invoke the certiorari jurisdiction of this Court under Rule 17 of the Supreme Court Rules.

Petitioners contend that the decision of the court of appeals is in conflict with various decisions of this Court, including *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208 (1939), and *Holland* v. *United States*, 348 U.S. 121 (1954), and with the Second Circuit's decision in *Ambook Enterprises* v. *Time, Inc.*, 612 F.2d 604 (2d Cir. 1979), *cert. dismissed*, 448 U.S. 914 (1980). *E.g.*, Petition, pp. 5-6. But, as we show below, the analyses of both this Court and those of other courts of appeals, including the Second Circuit, are entirely consistent with the decision of the court of ap-

peals in the instant case. In these circumstances, further review by this Court is plainly unwarranted.

1. The Court of Appeals Correctly Applied the Principles Established By This Court for the Review of Orders Granting Summary Judgment Motions in Antitrust Cases, and Correctly Concluded That Petitioners Had Not Presented Significant Probative Evidence To Support the Allegations of Their Complaint.

In *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253 (1968), the Court, in holding that the petitioner had not met the burden imposed upon him by Rule 56 of the Federal Rules of Civil Procedure to "set forth specific facts showing that there is a genuine issue for trial," stated as follows:

> "While we recognize the importance of preserving litigants' rights to trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding *the absence of any significant probative evidence* tending to support the complaint." *Id.* at 290. (Emphasis added.)

Petitioners seek to distinguish *Cities Service* solely on the untenable ground that that case involved an alleged conspiracy to refuse to deal, while this case involves an alleged conspiracy to fix prices in the form of interest rates. Although petitioners concede that any inferences drawn from parallel business behavior can be rebutted in concerted refusal-to-deal cases by a showing that the business context in which the behavior occurred renders an inference of unlawful conspiracy impermissible, they contend that a similar showing has not been, and should not be, permitted in price-fixing cases. Petition, p. i. Petitioners' purported distinction between price-fixing and concerted refusal-to-deal cases is fundamentally unsound. Indeed, in the very price-fixing cases

upon which petitioners most heavily rely, *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208 (1939), and *Ambook Enterprises* v. *Time, Inc.*, 612 F.2d 604 (2d Cir. 1979), *cert. dismissed*, 448 U.S. 914 (1980), both this Court and the Second Circuit searched the respective records (albeit in vain) for any evidence proffered by the defendants to explain, and thus to rebut the inferences drawn from, their identical conduct. *See* 306 U.S. at 224-26; 612 F.2d at 614-15. *See generally* pages 15-17, *infra*.

Petitioners' arguments, which are wholly without support in the decisions of this Court or any court of appeals, come perilously close to the obviously erroneous propositions that summary judgment should be eliminated as a procedural device in alleged price-fixing cases and that parallel pricing, without more, should be a sufficient basis for the imposition of antitrust liability. This Court in *Cities Service* expressly rejected the contention that Rule 56 "should, in effect, be read out of antitrust cases" (391 U.S. at 289); and this Court has explicitly rejected the contention that mere "parallel business behavior . . . constitutes a Sherman Act offense." *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 541 (1954).

The fallacies in petitioners' argument proceed from at least three basic misconceptions. First, petitioners misconstrue what the two lower courts did. Thus, they contend that the lower courts *required* them to show that the alleged price-fixing scheme was contrary to the economic interests of the banks. Petition, p. 7. Related to this argument is petitioners' apparent contention that the lower courts permitted the banks' sworn denials of conspiratorial activity "to stand as an absolute bar to price-fixing cases based on circumstantial evidence." Petition, p. 10 n.8. Second, petitioners contend that parallel pricing somehow occupies a position different from any other parallel business behavior (Petition, p. 9), and, therefore, the mere existence of parallel pricing should preclude the entry of summary judgment. Third, petitioners contend that the lower courts did not draw every conceivable

inference from the record in their favor. Petition, pp. 23-24, 26-29. None of petitioners' contentions is sound.

The sworn denials by the banks that they had engaged in any conspiratorial setting of interest rates (made largely in response to interrogatories propounded by petitioners or to questions at depositions initiated by petitioners) performed a limited, albeit important, function in this case. In light of these denials, it became incumbent upon petitioners "to produce significant probative evidence by affidavit or deposition that conspiracy existed if summary judgment [is] to be avoided." 467 F. Supp. at 209 (Pet. App. B-27), *quoting Lamb's Patio Theatre* v. *Universal Film Exchanges*, 582 F.2d 1068, 1070 (7th Cir. 1978). *Accord*, 641 F.2d at 462 (Pet. App. A-13) (majority opinion); *id.* at 475 (Pet. App. A-41) (dissenting opinion); *Pan-Islamic Trade Corp.* v. *Exxon Corp.*, 632 F.2d 539, 554 (5th Cir. 1980).

Thus, it was the proper function of the district court and of the court of appeals on review to examine the entire record to ascertain whether the petitioners had come forth with significant probative evidence of conspiracy.* Manifestly, neither court held that the probative value of petitioners' evidence of parallel pricing was "eliminated by the [banks'] conclusory sworn denials." Petition, p. 7. Rather, as the district court succinctly noted, "The question is whether the evidence *taken as a whole* warrants an inference of joint, consensual conduct rather than independent, individual action." 467 F. Supp. at 210 (Pet. App. B-30). (Emphasis added.) Similarly, the court of appeals concluded that "[b]ased on our independent review of the record, we . . . are unable to uncover any [significant probative] evidence" to support petitioners' conspiracy allegations. 641 F.2d at 461 (Pet. App. A-12).

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*See, e.g., *Baum* v. *Gillman*, 648 F.2d 1292, 1296-97 (10th Cir. 1981); *Tose* v. *First Pennsylvania Bank*, 648 F.2d 879, 883 (3d Cir. 1981); *Mutual Fund Investors* v. *Putnam Management Co.*, 553 F.2d 620, 624-25 (9th Cir. 1977).

Neither of the lower courts held, as the Petition insists (p. 7), that the petitioners were required to show that any alleged conspiratorial activity was contrary to the banks' economic interests. The district court instead held that this was simply *one method* by which petitioners could buttress any inferences that might be drawn from parallel business behavior. Thus, at the conclusion of its review of the record, the district court stated that petitioners had failed "*to produce significant probative evidence tending to support the complaint, or* evidence of action contrary to [the banks'] economic interests and of motivation to conspire, *or evidence of a 'plus factor' . . . .*" 467 F.Supp. at 214 (Pet. App. B-39-40). (Emphasis added.)*

In analyzing the record, the lower courts clearly considered petitioners' evidence of interest rate uniformity. No fair reading of the opinions below supports the view that the lower courts "disregard[ed]" this factor. Petition, p. 7. But parallel business behavior, without more, hardly permits an inference of conspiracy, and conspiracy is the very essence of a claim predicated upon Section 1 of the Sherman Act. As the Court stated in *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*:

> "[T]his Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely." 346 U.S. at 541.

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*Contrary to the suggestion in the Petition (p. 7), the court of appeals did not even mention the possibility that petitioners could defeat the motions for summary judgment by showing that the interest rates set by the banks were contrary to their economic interests.

Petitioners contend that parallel pricing is somehow unique and that stronger inferences can be drawn from parallel pricing than from any other form of parallel business behavior. The basic defect in this position is that parallel pricing, standing alone, simply does not permit an inference of conspiracy. *See, e.g., Cement Mfrs. Protective Ass'n* v. *United States*, 268 U.S. 588, 605-606 (1925); *Tose* v. *First Pennsylvania Bank*, 648 F.2d 879, 896 (3d Cir. 1981); *Granddad Bread* v. *Continental Baking Co.*, 612 F.2d 1105, 1111 (9th Cir. 1979).

Moreover, parallel pricing as circumstantial evidence of conspiracy is especially lacking in probative value where, as here, the record clearly demonstrates that the product in question—the cost of money—is fungible, that the banks faced identical business problems, including exceptionally high costs, in initiating the charge card program, and that an interest rate of 1½% per month (then commonly charged by other credit card issuers) was thought by the banks to be the most that they could charge at the outset of the program in 1966 and was explicitly imposed as the maximum by state law in 1967. Clearly, "[r]easonable businessmen will act similarly when presented with the same problem." *United States* v. *Borden Co.*, 111 F. Supp. 562, 579 (N.D. Ill. 1953), *aff'd in part, rev'd in part on other grounds*, 347 U.S. 514 (1954). As the court of appeals stated:

> "In the instant case, the product in question is consumer credit, or more fundamentally, the cost of borrowing money for a given period. The underlying product—money—is not only fungible, it is by definition an interchangeable medium of exchange. The defendants' own cost of money is highly regulated and, on a given day and specified amount, the cost is uniform. Thus, it is hardly surprising, or significant, that the defendants charged a parallel interest rate given their parallel costs. We agree with the District Court's conclusion as to the only rational inference to be drawn from parallel pricing in this case:

'The showing of parallel behavior under these circumstances, where each bank faced identical problems of fraud, credit losses, and large initial expense to which reasonable businessmen would react in the same fashion, does not provide a basis for the inference of the conspiracy which plaintiffs allege.' " 641 F.2d at 463 (Pet. App. A-16). (Footnotes omitted.)

In so holding, the court of appeals was clearly correct. The courts have uniformly recognized that no inference of conspiracy can reasonably be drawn from the mere fact of parallel pricing where businessmen are dealing with a fungible product and are faced with identical economic realities. *E.g., Tose* v. *First Pennsylvania Bank,* 648 F.2d 879, 896 (3d Cir. 1981).* Indeed, this Court has long recognized that uniformity in the sale price of fungible products can not lead to an inference of collusive price-fixing because competition will ordinarily cause one producer to charge about the same price as that charged by any other. *See, e.g., United States* v. *International Harvester Co.,* 274 U.S. 693, 708-709 (1927); *Cement Mfrs. Protective Ass'n* v. *United States,* 268 U.S. 588, 605-606 (1925).

**Accord, Bendix Corp.* v. *Balax, Inc.,* 471 F.2d 149, 160 (7th Cir. 1972), *cert. denied* 414 U.S. 819 (1973); *Independent Iron Works* v. *United States Steel Corp.,* 322 F.2d 656, 661 (9th Cir.), *cert. denied,* 375 U.S. 922 (1963); *FTC* v. *Lukens Steel Co.,* 454 F. Supp. 1182, 1187-88 (D.D.C. 1978). *See* Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal,* 75 Harv. L. Rev. 655, 658-59 (1962).

Of all the cases cited or discussed in the Petition, *Tose* v. *First Pennsylvania Bank, supra,* which involved, *inter alia,* an alleged conspiracy by banks to fix interest rates, is more nearly identical to the present case than any other, as the Petition concedes (p. 12). Thus, far from showing a split in the circuits, the Petition itself demonstrates that the relevant decisions of the courts of appeals are wholly consistent and, we submit, entirely correct.

This court's decision in *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208 (1939), upon which petitioners heavily rely,* hardly suggests any other conclusion. That case involved a letter sent by two motion picture exhibitor chains to eight different distributors demanding that the distributors require that all exhibitors charge certain minimum prices for first-run films and that they not show such films as a part of a double feature. All of the distributors complied with this request. While the Court concluded that the record in that case supported an inference of conspiracy, there were critical factors present in *Interstate* which are absent here. First, and perhaps most importantly, the *Interstate* defendants failed to offer any reasonable explanation for their identical conduct (306 U.S. at 223-26), sharply distinguishing it from the instant case. Second, the success of the combination depended on absolute compliance on the part of all defendants, each of which knew that an identical letter had been sent to

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*The Petition (p. 11) cites various cases for the proposition that, "in the uniform pricing situation, conscious parallelism can be strong circumstantial evidence of conspiracy." These cases were examined by the lower courts, *e.g.*, 467 F. Supp. at 213-14 (Pet. App. B-38-39), and were all found, correctly we submit, to be distinguishable from the instant case because they contained "plus factors," *in addition to* parallel pricing, from which the existence of a conspiracy could be reasonably inferred. So, also, in *Beatrice Foods Co.* v. *United States*, 312 F.2d 29 (8th Cir. 1963) (Blackmun, J.), upon which the Petition relies (p. 13 n.*), the evidence of price-fixing, wholly apart from parallel pricing, was substantial. *Inter alia*, bids submitted for sale of milk and cream to two institutions showed considerable disparity during the pre-conspiracy and post-conspiracy periods, but remarkable uniformity during the conspiracy period; there was direct evidence of price discussions among the co-conspirators; and no effort was made by the defendant to explain or rebut the evidence regarding pricing. 312 F.2d at 43-45. In those circumstances, it is hardly surprising that the court of appeals concluded that, even though a fungible product was involved, there was sufficient evidence to sustain the verdict for the Government.

the others.* Third, the letters were sent by large exhibitors, alleged co-conspirators, which dominated their markets, causing the other defendants to react immediately and favorably to the request.** Fourth, the defendants had failed to deny the existence of a conspiracy. 306 U.S. at 225-26. In light of these distinctions, it is wholly inaccurate to assert, as the Petition does (p. 7), that the decision of the court of appeals in this case "effectively overrules" *Interstate Circuit.*

Petitioners' reliance on *Ambook Enterprises* v. *Time, Inc.*, 612 F.2d 604 (2d Cir. 1979), *cert. dismissed*, 448 U.S. 914 (1980), is likewise misplaced; indeed the Second Circuit's legal analysis there supports the banks' position here. The plaintiff in *Ambook* alleged that certain advertising agencies and publication media conspired to violate Section 1 of the Sherman Act by agreeing that advertisements placed through selected agencies should receive a 15% "agency discount," while direct advertisers (such as plaintiff) should receive no discount. The court of appeals pointedly noted that no evidence whatever had been offered by the defendants to explain their parallel action in granting the agency discount. 612 F.2d at 614-15. The parallel action, involving literally hundreds of participants, thus stood unexplained in the record. The court carefully pointed out that a defendant could explain away any inference from parallel conduct by evidence of legitimate business considerations, thereby negat-

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*Significantly, the two conditions proposed in the letters constituted a radical business change opposed by the local managers for at least three distributors (*id.* at 222), and, therefore, allowed the inference that the proposed action was contrary to the economic self-interest of each distributor acting independently, and only made economic sense if all agreed to impose the conditions together.

**The request was transmitted directly from two conspirators (the movie chains) to the others (the eight distributors). 306 U.S. at 216. As the court of appeals noted in *United States* v. *Standard Oil Co.*, 316 F.2d 884, 896 (7th Cir. 1963), the "invitation" referred to in *Interstate* "was a solicitation to act in concert."

ing any inference of conspiracy. *Id.* at 615. Moreover, in *Ambook* the record revealed strong "plus factors," in addition to parallel conduct, which the court concluded tended to show the use of "coercion" and the existence of "fears of reprisal" in the implementation by defendants of the dual rate system. *Id.* at 616-17. The court also noted that "there was at least one question of credibility on a point of some importance." *Id.* at 611. Under all of these circumstances, the court of appeals concluded that summary judgment for the defendants had been improperly granted.

Quite apart from the factual dissimilarity between *Ambook* and the instant case, it is important to emphasize that the court of appeals in *Ambook*, a price-fixing case, relied upon this Court's analysis of summary judgment standards in *Cities Service* to determine whether the record contained significant probative evidence to support an inference of conspiracy. While the court of appeals concluded that the record in that particular case did support such an inference, the court's analytical approach, and especially its reliance upon *Cities Service*, clearly demonstrates that it perceived no relevant distinction between price-fixing and refusal-to-deal cases for purposes of determining the propriety of granting a motion for summary judgment. The inquiry in both situations is the same: Does the record contain significant probative evidence from which a trier of fact could reasonably infer that the actions of the defendants resulted from conspiracy, rather than from independent business judgments? This is precisely the approach followed by the court of appeals in the instant case.

Petitioners also contend, relying on *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962), and *United States* v. *Diebold, Inc.*, 369 U.S. 654 (1962), that the court of appeals failed to draw every conceivable inference from the evidence in their favor. Petition, pp. 23-24. The basic error in petitioners' position is that where, as here, the facts are undisputed (Petition, p. 3), the task of the district court,

and of the court of appeals on review, is to determine the *reasonable* inferences that can be drawn from the uncontradicted evidence. If such reasonable inferences do not support a plaintiff's allegations of conspiracy, summary judgment for the defendant must be granted. *E.g., American Telephone and Telegraph Co.* v. *Delta Communications Corp.*, 590 F.2d 100 (5th Cir.), *cert. denied*, 444 U.S. 926 (1979).* Thus, the district court correctly held that "inferences drawn from circumstantial evidence must be logical and reasonable, not based on speculation and conjecture." 467 F. Supp. at 210 (Pet. App. B-30-31). This position is fully in accord with the views expressed in *Galloway* v. *United States*, 319 U.S. 372, 395 (1943), where this Court, in affirming a directed verdict for the defendant, stated that "the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked." *Accord, Tose* v. *First Pennsylvania Bank*, 648 F.2d 879, 894-95 (3d Cir. 1981); *Edward J. Sweeney & Sons* v. *Texaco*, 637 F.2d 105, 110-11 (3d Cir. 1980); *British Airways Board* v. *Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979).

In these circumstances, it was entirely appropriate for both the district court and the court of appeals to consider the inferences that could be drawn from the undisputed facts and to conclude that the *reasonable* inferences that could be drawn from the facts of record did not constitute significant probative evidence of conspiracy appropriate for submission to a trier of fact. This was precisely the procedure that was followed in *Cities Service*, where this Court, after analyzing the evidence that had been presented by both parties, stated:

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*As the court of appeals there noted, "If a frog be found in the party punch bowl, the presence of a mischievous guest—but not the occurrence of spontaneous generation—may reasonably be inferred." 590 F.2d at 102.

> "Therefore, not only is the inference that Cities' failure to deal was the product of factors other than conspiracy at least equal to the inference that it was due to conspiracy, thus negating the probative force of the evidence showing such a failure, *but the former inference is more probable.*" 391 U.S. at 280. (Emphasis added.)

As in *Cities Service*, the courts below examined the record and concluded that the inferences that petitioners seek to draw from the undisputed facts were simply too remote and speculative to withstand the motions for summary judgment, particularly in light of the business explanations given by the banks for their interest rates, the economic realities that each bank faced in launching the new credit card venture, and the fact that the 1½% interest rate (commonly used by other credit card issuers) was thought by the banks to be the maximum available in 1966 under Illinois law and was expressly imposed as the maximum by statute in 1967.

Indeed, the vast bulk of petitioners' evidence fell within the range of mere "opportunity" evidence. This evidence suggested that, because various bank officers were engaged in common business or civic endeavors and because the banks cooperated in the establishment of the Midwest bank card system, they had the *opportunity* to conspire. But, as the court of appeals correctly held, the "mere opportunity to conspire, even in the context of parallel business conduct, is not necessarily probative evidence of conspiracy." 641 F.2d at 462 (Pet. App. A-14).*

Petitioners also argue that the majority opinion, by referring to *Pevely Dairy Co.* v. *United States*, 178 F.2d 363 (8th Cir. 1949), *cert. denied*, 339 U.S. 942 (1950), incorrectly incorporated the *Pevely* case into its analysis of the standards

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Accord, id. at 477 (Pet. App. A-47) (dissenting opinion); *Tose* v. *First Pennsylvania Bank*, 648 F.2d 879, 894 (3d Cir. 1981); *Venzie Corp.* v. *United States Mineral Products Co.*, 521 F.2d 1309, 1313 (3d Cir. 1975); *Overseas Motors, Inc.* v. *Import Motors Ltd.*, 375 F. Supp. 499, 535 (E.D. Mich. 1974), *aff'd*, 519 F.2d 119 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975).

governing summary judgment motions. Petition, pp. 20-22. But the majority's reference to *Pevely* (641 F.2d at 463 (Pet. App. A-15)) does not occur in connection with its discussion of the standards to be employed in deciding summary judgment motions, for, as noted *supra*, pp. 7-8, the majority and dissenting opinions are in accord with respect to the basic principles applicable to this case. Indeed, the dissenting opinion does not even mention the majority's treatment of the *Pevely* case. Rather, the majority's reference to *Pevely* occurs in the context of its discussion of parallel pricing and its express rejection of the notion that parallel pricing, together with an opportunity to conspire, is sufficient to require a trial on the merits. This discussion contrasts the factual background of *Pevely*, involving an essentially fungible product, milk, with cases relied upon by petitioners, including *C-O-Two Fire Equipment Co.* v. *United States*, 197 F.2d 489 (9th Cir. 1952), which expressly distinguishes *Pevely* on the basis of the nature of the product involved in the two cases. The contrast between *Pevely* and *C-O-Two* was used by the majority to illustrate the wholly non-controversial principle that "parallel pricing or conduct lacks probative significance when the product in question is standardized or fungible." 641 F.2d at 463 (Pet. App. A-15). (Citations omitted.) *See generally* pages 13-14, *supra*.

The Petition also contends that the jury instructions given in *Pevely** were disapproved by the Court in *Holland* v.

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*The jury instructions approved by the court of appeals in *Pevely* contained the following statement:

> "Where circumstantial evidence is relied upon to establish the conspiracy or any other essential facts, it is not only necessary that all the circumstances concur to show the existence of such conspiracy and facts sought to be proved, but such circumstantial evidence must be inconsistent with any other rational conclusion." 178 F.2d at 367.

The majority opinion in this case expressly recognized that *Pevely*, as a criminal case, involved "differing standards of proof" from the instant case. 641 F.2d at 463 (Pet. App. A-15).

United States, 348 U.S. 121 (1954), but reliance upon *Holland* in this case is misplaced. In *Holland*, the Court simply stated that, where the jury in a criminal case is properly instructed on the requirement of proof beyond a reasonable doubt, an additional instruction on circumstantial evidence is unnecessary and may be confusing to the jury. 348 U.S. at 139-40. In this case, the majority used the *Pevely* case, not to analyze a jury instruction, but rather to emphasize the need for careful scrutiny of circumstantial evidence to ensure that a trier of fact, in analyzing the inferences that can be drawn from such evidence, does not engage in rank conjecture or speculation. This position is fully consistent with the views of this Court and of other courts of appeals,* and with the application of summary judgment principles set forth by the Court in *Cities Service*.

2. The Court of Appeals, in Affirming the Motions for Summary Judgment, Properly Considered, and Rejected, Petitioners' Arguments Concerning Their Lobbying Evidence and the Affidavit of Their Economist.

A. Lobbying evidence.

In deciding the motions for summary judgment, the district court declined to consider petitioners' evidence relating to certain lobbying activity undertaken by Midwest "in light of its minimal probative value as well as inevitable prejudicial effect on a jury." 467 F. Supp. at 208 n.22 (Pet. App. B-25). The court of appeals, relying on Rule 403 of the Federal Rules of Evidence, held that this ruling of the district court was correct. 641 F.2d at 466-67 (Pet. App. A-22-24).

There is no question that, in 1966, the issue of the maximum interest rate that could be charged on bank charge

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*See, e.g., *Pennsylvania R.R. Co.* v. *Chamberlain*, 288 U.S. 333, 339-44 (1933); *Edward J. Sweeney & Sons* v. *Texaco*, 637 F.2d 105, 116 (3d Cir. 1980); *South-East Coal Co.* v. *Consolidation Coal Co.*, 434 F.2d 767, 777 (6th Cir. 1970), *cert. denied*, 402 U.S. 983 (1971); *Wesson* v. *United States*, 127 F.2d 931, 933 (8th Cir. 1949).

cards in Illinois had not been resolved by any definitive judicial or legislative decision. The banks concluded, based upon the advice of counsel and/or opinions of the Comptroller of the Currency, that 1½% per month was the maximum rate they could charge. *See* pages 4-5, *supra*.* Nevertheless, none of the banks could, with complete assurance, rely upon the 1½% figure, or any other rate, as being legally permissible. Furthermore, a large number of bills were introduced in the Illinois legislature in 1967 which would have affected the proposed charge card operation. In these circumstances, it was necessary for Midwest to present the views of the banks to the legislature. This was done through the employment of Mr. William R. Dillon. 641 F.2d at 461 (Pet. App. A-9-10).

No one disputes that this lobbying activity was entirely lawful under the decisions of this Court in *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965), and *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight*, 365 U.S. 127 (1961). *See First National Bank of Omaha* v. *Marquette National Bank*, 636 F.2d 195 (8th Cir. 1980). Nevertheless, the Petition (pp. 14-15), relying on a footnote in *Pennington*, reiterates the contention rejected below that a jury should be permitted to consider the constitutionally-protected lobbying activity as evidence that the banks entered into an unlawful price-fixing conspiracy.

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*The argument in the Petition (p. 17) that there was no explicit maximum interest rate in Illinois in 1966 for charge cards is quite beside the point. The evidence is uncontradicted that each bank independently concluded that it would have to charge the highest rate that was legally permissible. In light of the uncertainty of Illinois law, each of the banks independently concluded that the highest rate for which sound legal arguments could be marshalled in support was 1½% per month. Whether the opinions or legal analyses relied upon by any of the banks in this respect were correct is simply irrelevant. The critical fact is that each of the banks perceived in 1966 that the highest rate which was legally defensible was 1½%.

In the first instance, petitioners fail to note that the *Pennington* footnote (381 U.S. at 670 n.3) is directed solely to the discretion of the district court. The Court in *Pennington*, holding that lobbying evidence had been improperly admitted in the absence of an appropriate instruction, stated that "[i]t would of course still be within the province of the trial judge to admit this evidence, *if he deemed it probative and not unduly prejudicial . . . .*" *Id.* (Emphasis added.) Thus, the *Pennington* footnote is directed precisely to the district court's discretion, *Lamb Enterprises* v. *Toledo Blade Co.*, 461 F.2d 506, 516 (6th Cir.), *cert. denied*, 409 U.S. 1001 (1972), and no abuse of that discretion has been shown here.

The Petition asserts (p. 15) that the court of appeals misinterpreted Rule 403 of the Federal Rules of Evidence, which permits the district court to exclude evidence if, *inter alia*, "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." In this connection, petitioners argue that the rule is intended to apply only to evidence that tends to inflame the passions of the jury. This position is plainly wrong. As the Notes of the Advisory Committee state with respect to Rule 403,

> "The case law recognized that certain circumstances call for the exclusion of evidence which is of unquestioned relevance. These circumstances entail risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme. . . .
>
> "Exclusion for risk of unfair prejudice, confusion of issues, misleading the jury, or waste of time, all find ample support in the authorities. *'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.*" Notes of Advisory Committee on Proposed Rules, Title 28, U.S.C.A., Rule 403. (Emphasis added.)

Thus, evidence has been excluded where the concern of the court was that the evidence in question would confuse the issues presented to the jury. *E.g., Estate of Le Baron* v. *Rohm and Haas Co.*, 506 F.2d 1261, 1263-64 (9th Cir. 1974);* *Apicella* v. *McNeil Laboratories*, 66 F.R.D. 78, 86-87 (E.D.N.Y. 1975) (Weinstein, J.).

In view of the complete discovery record in this case, the district court was obviously in a position to place the lobbying evidence in its proper context (*see* pages 4-5, *supra*) and to conclude that its probative value was "minimal." 467 F. Supp. at 270 n.22 (Pet. App. B-25). Moreover, as the court of appeals held, because of "the lack of any substantial evidence of an antitrust conspiracy in the instant case" (641 F.2d at 467 (Pet. App. A-24)), introduction of the lobbying evidence would create a particularly confusing situation for a jury. The jury would have to be instructed that "[s]uch conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." *United Mine Workers* v. *Pennington*, *supra*, 381 U.S. at 670. Thus the jury would simply be left to speculate whether entirely lawful conduct constituted evidence of an unlawful conspiracy separate from the constitutionally-protected activity. *See United States* v. *Johns-Manville Corp.*, 259 F. Supp. 440, 453 (E.D. Pa. 1966). In these circumstances, the court of appeals correctly held that the lobbying evidence "could easily result in a finding of antitrust liability for engaging in the First Amendment right to petition which

*In *Le Baron*, the court of appeals relied on proposed Rule 403 in holding that the district court, in post-trial proceedings, properly ruled inadmissible certain data relating to defendants' costs and profits because the probative value of this relevant evidence on the question of the existence of a price-fixing conspiracy "was slight and was clearly outweighed by the difficulties the submission of this evidence would have brought to a jury trial." *Id.*

Noerr-Pennington protects." 641 F.2d at 467 (Pet. App. A-24).*

Moreover, the basic thrust of petitioners' argument leads directly to the absurd result that the district court, having concluded that the probative value of the lobbying evidence was "minimal" and that its prejudicial effect was "inevitable," should nevertheless have used the evidence to find the existence of a material issue of fact. There is no authority for such a wholly useless procedure.**

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*It is difficult to comprehend what comfort petitioners obtain from their reliance on *Webb* v. *Utah Tour Brokers Ass'n*, 568 F.2d 670 (10th Cir. 1977), and *Household Goods Carriers' Bureau* v. *Terrell*, 452 F.2d 152 (5th Cir. 1971). Petition, p. 15. Both cases directly involved allegations that the defendants had improperly sought assistance from government agencies in an effort to eliminate the plaintiffs as competitors. Indeed, in *Webb*, the court of appeals invoked the "sham" exception to the *Noerr-Pennington* doctrine, holding that defendants' activities "were designed to and succeeded in bringing about a boycott of the plaintiffs . . . ." 568 F.2d at 676. Yet petitioners have expressly disavowed reliance upon the "sham exception" to *Noerr-Pennington*. Petition, p. 15.

**Petitioners apparently believe that it was inappropriate for the district court to have determined the inadmissibility of the lobbying evidence outside the context of an actual trial. But the very purpose of summary judgment procedures is to ascertain whether there is sufficient *admissible* evidence which demonstrates the existence of a material issue of fact. *E.g.*, *Jones* v. *Menard*, 559 F.2d 1282, 1285 n.5 (5th Cir. 1977). Thus, "in ruling on a motion for summary judgment, only evidence or statements that would be admissible at a trial and having probative force, may be considered." *First National Bank Co.* v. *Insurance Co.*, 606 F.2d 760, 766 (7th Cir. 1979). *See* 6 *Moore's Federal Practice* ¶ 56.11 [1.--8] (2d Ed. 1976), at pp. 56-205--56-207. For this reason, decisions concerning the admissibility of evidence are frequently made at the summary judgment stage. *E.g.*, *Pan-Islamic Trade Corp.* v. *Exxon Corp.*,

(Footnote continued on next page)

Fundamentally, what petitioners are complaining about is the exercise of the district court's discretion, already reviewed by the court of appeals, concerning the probative value and prejudicial impact of certain specific evidence presented in the context of a particular case. But it is clearly inappropriate to request this Court to review discretionary evidentiary rulings by district judges, particularly when the ruling in question has already been thoroughly examined by the court of appeals.

B. Affidavit of petitioners' economist.

Petitioners assert that the majority opinion ignores their economic "evidence," specifically an affidavit submitted by Dr. Bernard Shull. Petition, pp. 25-26. To the contrary, not only did the opinion of the district court discuss this affidavit at length (467 F. Supp. at 212-13 (Pet. App. B-34-38)), but the majority opinion of the court of appeals twice refers expressly to Dr. Shull's opinion and the district court's conclusions with respect to it. 641 F.2d at 460-61 (Pet. App. A-9-10).

The Shull affidavit clearly fails to "set forth specific facts showing that there is a genuine issue for trial" as required by Rule 56. While the affidavit makes various assertions concerning the alleged oligopolistic nature of the Chicago banking market and describes certain background details concerning

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(Footnote continued from previous page)

632 F.2d 539, 556-58 (5th Cir. 1980); *Jones* v. *Menard, supra; American Securit Co.* v. *Hamilton Glass Co.*, 254 F.2d 889, 893 (7th Cir. 1958); *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 513 F. Supp. 1100, 1117-18, 1135-39 (E.D. Pa. 1981). *See also Estate of Le Baron* v. *Rohn and Haas Co., supra*, 506 F.2d at 1263-64; *Apicella* v. *McNeil Laboratories, supra*, 66 F.R.D. at 86-87 (pre-trial order holding evidence inadmissible under Rule 403). Thus, petitioners' contention that the district court in this case could not properly rule upon the admissibility of the lobbying evidence outside the context of an actual trial is simply without merit.

the charge card program in which the banks were participants, the affidavit does not, as it could not, aver that the interest rates were the result of an unlawful price-fixing conspiracy. Indeed, the affidavit's conclusory, and clearly speculative, statement to the effect that "conscious cooperation" was the likely cause of the 1½% interest rate is based upon little more than the affidavit's prior statements regarding the supposedly oligopolistic nature of the Chicago banking market. Petitioners' attempt to infer a conspiracy from the existence of a particular market structure was cogently answered by the district court as follows:

> "Plaintiffs' argument regarding market structure . . . is simply a variation of their argument regarding opportunity to conspire. Plaintiffs argue that the market structure of the Chicago banking industry in 1966 was oligopolistic and therefore conducive to collusion. Even assuming this characterization to have merit, it cannot constitute a 'plus factor' sufficient to bar summary judgment. The fact that market structure might have permitted collusion does not allow the inference that collusion occurred where, as here, defendants have offered sworn, credible denials of the existence of conspiracy and years of discovery by plaintiffs has uncovered no affirmative evidence of this kind of conduct." 467 F. Supp. at 212 (Pet. App. B-35).

Dr. Shull's affidavit differs markedly from that considered in *Bieghler* v. *Kleppe*, 633 F.2d 531 (9th Cir. 1980), upon which the Petition relies (p. 26). In that case, the court of appeals noted that

> "[t]he accident reconstruction expert described in his affidavit the tunnel accident and its cause as he had reconstructed them. The expert did more than conclude that defendants' negligence in lighting the tunnel *might* have caused the accident. He purported to determine that *the* cause of the accident was defendants' negligence." 633 F.2d at 534. (Emphasis in original.)

Indeed, the Shull affidavit more nearly resembles the testimony that was rejected by this Court in *United States* v.

United States Steel Corp., 251 U.S. 417 (1920), where the Court, affirming a judgment for the defendant, stated the following with respect to the opinion testimony of plaintiffs' expert witness concerning pricing:

> "His deduction was that when prices are constant through a definite period an artificial influence is indicated; if they vary during such a period it is a consequence of competitive conditions. It has become an aphorism that there is danger of deception in generalities, and in a case of this importance we should have something surer for judgment than speculation, something more than a deduction equivocal of itself even though the facts it rests on or asserts were not contradicted. . . . Of course competition affects prices but it is only one among other influences and does not more than they, register itself in definite and legible effect." 251 U.S. at 448-449.

Petitioners also insist that the majority opinion failed to consider evidence of the banks' "obvious economic motive to conspire," stating that "[t]he record is clear that the banks feared the entry of any bank credit card at a lower rate than had been planned because they would then have been forced to market their cards at the lower rate as well." Petition, p. 25. While the record is indeed clear, it is not as petitioners have described it. As the court of appeals' opinion expressly demonstrates (641 F.2d at 465-66 Pet. App. A-20-21), the concern expressed by some of the banks with respect to possible chaotic market conditions had nothing to do with interest rates. Rather, the concern was that, if each bank issued its own non-compatible card, merchants would have to accept many cards issued by different banks (rather than one compatible card) and then would have to look to each individual bank for payment. The use of a compatible charge card was designed to simplify the administration of the charge card program. Most importantly, there is absolutely no evidence that the compatability features of the charge card program,

dealing with the interchange of charge slips, credits, and the like, had any relationship to, or effect upon, the interest rates that each bank charged.

In the same vein, petitioners assert that it was unnecessary for the banks to create a compatible charge card system and that their actions have therefore created "artificial product standardization." Petition, p. 25. But the creation of the compatible charge card system, which even petitioners do not attack as unlawful, was clearly a matter of business judgment for the banks. Thus, the emphasis upon the Shull affidavit simply diverts attention from the main point: There is no significant probative evidence of a conspiracy to fix interest rates.

The long and short of the matter is that petitioners' economic "evidence" has nothing to do with this case.* Petitioners apparently forget that this is a private treble damage action brought by purportedly aggrieved individuals who think that they are paying too much for credit. This is not a proceeding brought by the Government attacking an allegedly monopolistic venture. Thus, petitioners' contentions to the contrary notwithstanding, questions of market power, oligopoly, or product standardization are clearly beside the point. The charge is a conspiracy to fix interest rates. As to this issue, petitioners have engaged in a ten-year fishing expedition and have returned empty-handed.

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*See *Zenith Radio Corp.* v. *Matsushita Electronic Industrial Co.*, 513 F. Supp. 1100, 1187 (E.D. Pa. 1981), where the district court, granting defendants' motion for summary judgment in a multifaceted antitrust case, stated the following with respect to the proffered evidence concerning the defendants' market power:

> "It is clear beyond peradventure that plaintiffs' allegations about the combined economic power of the defendants and their cartel is 'bootstrapped' and is in any event utterly of no probative value in drawing an inference of the conspiracy alleged by plaintiffs."

CONCLUSION

After literally years of discovery, petitioners identified the precise evidence upon which they would rely at trial to support their allegations of a conspiracy to fix interest rates involving the banks. The district court, in accordance with this Court's decision in *Cities Service*, thoroughly examined the record and concluded that petitioners had failed to come forth with significant probative evidence to support their conspiracy allegations. The court of appeals, after its independent examination of the record, reached the same result. The decision of the court of appeals is fully in accord with the decisions of this Court and is entirely consistent with the decisions of other courts of appeals. No basis has been shown for further review of this case by this Court. Accordingly, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 81-152

In the Supreme Court of the United States

OCTOBER TERM, 1981

JACK WEIT, JAMES B. COX and ROBERT W. MCLALLEN, ETC., PETITIONERS

v.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that petitioners had failed to adduce sufficient facts supporting their claim of a price-fixing conspiracy to resist respondents' summary judgment motions.

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INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

Petitioners are holders of credit cards issued by respondent Continental Illinois National Bank and Trust Company of Chicago as part of the Midwest Bank Card System, Inc. ("Midwest"), a bank credit

card system established in 1966. Respondents are major banks in the Chicago market that are members of Midwest and were involved in its initial planning and development.[1] In 1970 petitioners filed a complaint in the United States District Court for the Northern District of Illinois alleging, *inter alia*, that respondents had engaged in a horizontal price-fixing conspiracy in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The conspiracy allegedly consisted of an agreement among the respondent banks to charge the identical interest rate of one and one-half per cent per month, or 18% per year, to their bank card customers.[2]

After eight years of extensive discovery,[3] respondents moved for summary judgment.[4] In support of their motions, respondents supplied affidavits denying petitioners' allegations and claiming that each bank had independently arrived at the 18% interest rate based upon its own analysis of the applicable usury laws and its own estimate of the costs likely to be

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[1] Although a representative of respondent American National Bank & Trust Co. attended the initial meetings in 1966 leading to the formation of Midwest, it did not join Midwest until 1969 (Pet. App. A-6 to A-7 & n.5).

[2] A cardholder pays interest only when he fails to pay the balance due within the time allowed by his bank (Pet. App. B-44). The method used to compute the actual amount of interest owed on an unpaid balance varies from bank to bank (Pet. App. A-9 n.11).

[3] Petitioners' discovery consisted of "at least 71 depositions, 297 interrogatories, 128 requests for admission, and innumerable document production requests" (Pet. App. B-26).

[4] Prior motions for summary judgment had been denied in 1974 (Pet. App. D) and in 1976 (Pet. App. E).

incurred in establishing the credit card system (Pet. App. A-10). Respondents denied discussing the interest rates to be charged customers, and they presented evidence that their activities had been monitored carefully by counsel to prevent any possible antitrust violations (*id.* at A-10 to A-11).

Petitioners' evidence of alleged conspiracy was entirely circumstantial. That evidence showed that all of the respondent banks charged 18% interest on their credit cards from 1966 to 1978 (Pet. App. A-9 & n.11); that during the meetings resulting in the formation of Midwest a representative of a respondent bank mentioned the rate allowed under state usury laws and another mentioned the rate charged by Bank Americard (*id.* at A-18 to A-19); that officers of the respondent banks had many opportunities to discuss interest rates (*id.* at A-9, A-32); and that the agreement establishing Midwest mandated uniformity among its members in most aspects of their credit card operations (*id.* at A-38). Petitioners also relied upon respondents' successful joint lobbying efforts before the Illinois state legislature in support of legislation that, as finally enacted, established an annual interest rate ceiling of 18% (*id.* at A-10, A-22, A-39). Finally, petitioners submitted an affidavit by their economic expert, Bernard Shull, who expressed the opinion that "conscious cooperation" was the likely cause of the uniform rate charged by respondents (*id.* at A-9).

2. The district court granted respondents' motions for summary judgment (Pet. Apps. B & C), finding that the facts adduced by petitioners in support of their price-fixing claim were insufficient to support a jury verdict in their favor or to resist respondents' summary judgment motions (*id.* at B-26 to B-40). The court observed that after eight years of extensive

discovery plaintiffs had exhausted virtually every possible source of evidence, and the court stated that petitioners' " 'vague hope that something may turn up at trial' " was not enough to justify further protracted proceedings (*id.* at B-26 to B-27, quoting *Perma Research and Development Co.* v. *Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969)). In reaching its conclusion, the court refused to consider respondents' joint lobbying activities (Pet. App. B-25 n.22). The court noted (*ibid.*) this Court's holdings that such activities are permitted under the Sherman Act (*United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965); *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961)) and also the Court's statement in *Pennington* that a trial judge has the discretion to admit evidence of such activities to show the purpose or character of other allegedly illegal transactions provided that the judge concludes that the evidence is "probative and not unduly prejudicial" (381 U.S. at 670 n.3). The district court stated that it would exclude such evidence if the present case went to trial "in light of its minimal probative value as well as inevitable prejudicial effect on a jury" and it therefore excluded that evidence from consideration in ruling upon respondents' summary judgment motions (Pet. App. B-25 n.22).

3. The court of appeals affirmed with one judge dissenting (Pet. App. A). Both the majority and the dissenting opinions recognized that summary judgment may be granted only if the facts adduced by the parties would be insufficient to support a verdict in favor of the party opposing the motion (*id.* at A-11 to A-12, A-30). The two opinions differed, however, in their assessment of the strength of petitioners' evi-

dence (*id.* at A-13 to A-22, A-31 to A-53). The two opinions also disagreed about the district court's ruling concerning evidence of respondents' joint lobbying activities. While the majority held that the district court had correctly excluded that evidence from consideration (*id.* at A-22 to A-24), the dissent suggested that evidence of slight probative value may be excluded under Fed. R. Evid. 403 only if it "tends to horrify, evoke sympathy or increase a desire to punish due to prior bad acts" (Pet. App. A-44).

ARGUMENT

The decision of the court of appeals rests largely upon the peculiar facts of this case and does not conflict with any decision of this Court or any other court of appeals. It presents no legal issue of general importance that warrants this Court's review.

1. Petitioner's primary argument (Pet. 6-14) is that the standard applied by the court of appeals in granting summary judgment was "[n]ovel and [i]llegitimate" (*id.* at 6) and conflicts with decisions of this Court and the lower federal courts (*id.* at 8-14). Petitioners' contention lacks merit.

The "[n]ovel and [i]llegitimate [s]tandard" to which petitioners refer (Pet. 6) is apparently the following (Pet. App. A-13; citations omitted):

> Parallel business behavior or "conscious parallelism" is the type of circumstantial evidence which, absent more direct evidence, will be relied on in inferring unlawful agreement. However, when defendants come forward with denials sufficient to shift the burden under Rule 56(e), plaintiffs must come forward with some significant probative evidence which suggests that conscious parallelism is the result of an unlawful agreement.

Contrary to petitioners' assertion, the standard employed by the court of appeals was neither novel nor erroneous. Rule 56(c), Fed. R. Civ. P., provides that summary judgment must be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." A defendant is entitled to judgment as a matter of law where the plaintiff's claim for relief is based on an erroneous legal theory or where, viewing the evidence in the light most favorable to plaintiff, the evidence on which plaintiff relies is not sufficient to support a jury verdict in his favor. See 10 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* §§ 2725-2728 (1973); II P. Areeda & D. Turner, *Antitrust Law: An Analysis of Antitrust Principles and their Application* § 316 (1978). When a motion for summary judgment is not based exclusively upon the pleadings, "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits [, depositions, answers to interrogatories, or admissions] must set forth specific facts showing that there is a genuine issue for trial." Rule 56(e), Fed. R. Civ. P. If the "specific facts" contained in the parties' submissions would be insufficient to support a verdict in favor of the party opposing the motion, even when viewed in the most favorable light (see *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 157 (1970)), then the motion must be granted. See *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 288-290 (1968); *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620, 624 (1944); *United States* v. *General Motors Corp.*, 518 F.2d 420, 441-442 (D.C. Cir. 1975); 10 C. Wright & A. Miller, *supra*, § 2725, at 512.

The court of appeals merely applied these familiar principles to petitioners' action alleging a horizontal conspiracy to fix prices. It is well established that evidence of parallel pricing does not conclusively prove the existence of a price-fixing conspiracy. *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 541 (1954). Parallel pricing may result from independent business decisions by the alleged conspirators. Indeed, as the court of appeals recognized (Pet. App. A-15), a competitive market in a fungible product such as money would be characterized by price uniformity. Thus, the court of appeals correctly held (Pet. App. A-13) that where the "specific facts" contained in the parties' submissions conclusively negate the inference of a conspiracy arising from the evidence of price uniformity, summary judgment must be granted in the defendants' favor unless there are sufficient additional facts to support the claim of conspiracy. It is this unobjectionable principle that petitioners attack.

Applying that principle to the particular facts of the present case, the court of appeals decided, after a thorough and independent review of the record, that respondents were entitled to summary judgment. Like the district court, the court of appeals concluded that the facts brought out by eight years of exhaustive discovery were too insubstantial either to support a jury verdict or to justify a trial. There is no need for this Court to review those factual determinations, which are of importance only in this particular case. See *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

Petitioners' claim that the decision of the court of appeals conflicts with *Interstate Circuit, Inc.* v. *United*

States, 306 U.S. 208 (1939), is also without merit. In that case—a price-fixing suit brought by the government against motion picture distributors and exhibitors—the exhibitors, who operated the vast majority of movie theaters in cities in their region, had sent the same letter to each distributor demanding that the distributor adhere to certain terms in licensing its pictures to all theaters in that area. After conferring with the exhibitors, each distributor agreed to most of the terms. After a trial, the district court entered judgment in favor of the government and inferred the existence of a conspiracy among the distributors

> from the nature of the proposals made on behalf of [the exhibitors]; from the manner in which they were made; from the substantial unanimity of action taken upon them by the distributors; and from the fact that appellants did not call as witnesses any of the superior officials who negotiated the contracts with [the exhibitors] or any official who, in the normal course of business, would have had knowledge of the existence or non-existence of such an agreement among the distributors.

Id. at 221. This Court affirmed, finding the evidence sufficient to support the finding of a conspiracy among the distributors.

Petitioners are less than clear in specifying precisely how *Interstate Circuit* conflicts with the present case. Petitioners state (Pet. 8):

> In *Interstate Circuit*, the collective pricing action of the defendants was held to be sufficient circumstantial evidence of conspiracy * * *.

But in the present case, the court of appeals recognized that an unlawful agreement may be inferred

from price uniformity (see Pet. App. A-13). The court of appeals held, however, that such an inference may be negated by strong, contrary evidence and is not always sufficient by itself in such circumstances to support a jury verdict. There is nothing to the contrary in *Interstate Circuit*.

Petitioners state (Pet. 8):

> Although the Court mentioned [in *Interstate Circuit*] that it was open to the defendants in such a case to present evidence that their actions actually arose from independent motives, there is no hint that such evidence would be anything but contrary evidence to be weighed by a jury.

But *Interstate Circuit* reached this Court after the trial was completed, and the evidence of price uniformity was by no means the only proof supporting the trial court's finding. Thus, petitioners would infer a conflict from this Court's failure to address an issue not germane either to the procedural posture of the case before it or to the evidence in that case.

In like manner, nothing in the court of appeals' decision conflicts with *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962), or *United States* v. *Diebold, Inc.*, 369 U.S. 654 (1962), as petitioners claim (Pet. 23, 26). These decisions do not preclude district courts from entering summary judgment against antitrust plaintiffs who fail to offer "any significant probative evidence tending to support the complaint." *First National Bank of Arizona* v. *Cities Service Co.*, *supra*, 391 U.S. at 290.

There is also no conflict between the present case and *Ambook Enterprises* v. *Times Inc.*, 612 F.2d 604 (2d Cir. 1979), cert. dismissed, 448 U.S. 914 (1980). Although the court of appeals there reversed the entry of summary judgment in favor of defendants

alleged to have conspired to fix prices, the evidence proffered by the plaintiff was significantly different from that in the case at bar. For one thing, there was "abundant" evidence that a price-fixing conspiracy had existed before the period alleged in the complaint (612 F.2d at 611). Indeed, far from supporting petitioners' argument, *Ambook Enterprises* actually rejects petitioners' central contention that evidence of price uniformity is always sufficient to defeat a defense motion for summary judgment in a price-fixing case. In *Ambook Enterprises*, the court recognized that summary judgment may be properly entered in favor of the defendants where the inference arising from evidence of parallel conduct is "explained away" or "overwhelm[ed] by their proof (see *id.* at 615 & n.17). Moreover, as support for that proposition the *Ambook Enterprises* court (see *id.* at 615) relied upon *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253 (1968), a case involving a parallel refusal to deal. Thus, *Ambook Enterprises* is also inconsistent with petitioners' contention (see Pet. 6-10) that the court of appeals "misapplied" the *Cities Service* decision by relying upon it in a price-fixing context. We fully recognize that the inference arising from evidence of parallel business conduct may be stronger in some types of cases than in others (and certainly the strength of the inference varies in individual cases depending upon the nature of the proof), but there is simply no authoritative support for petitioners' claim that proof of parallel pricing is always sufficient to defeat summary judgment in favor of the defendants.[6]

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[6] There is also no conflict between the decision of the court of appeals and the other lower federal court decisions cited but not discussed by petitioners (see Pet. 11 n.*). None of

2. Petitioners also claim (Pet. 14-20) that the district court committed reversible error in excluding evidence of respondents' joint lobbying efforts, but that argument also lacks merit. This Court has held that such activity does not violate the Sherman Act, 15 U.S.C. 1. *United Mine Workers* v. *Pennington*, *supra*; *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, *supra*. In *Pennington*, this Court added (381 U.S. at 670-671 n.3; emphasis added):

> It would of course still be within the province of the trial judge to admit this evidence, *if he deemed it probative and not unduly prejudicial*, under the "established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny."

In the present case, the district court excluded evidence of respondents' joint lobbying efforts because it deemed that evidence unduly prejudicial and of minimal probative value (Pet. App. B-25 n.22). Under Fed. R. Evid. 403, such a ruling may be disturbed on appeal only if the district court acted "arbitrarily or irrationally." *United States* v. *Robinson*, 560 F.2d 507, 515 (2d Cir. 1977) (en banc), cert. denied, 435 U.S. 905 (1978). See also *United States* v. *Alessandrello*, 637 F.2d 133, 146 (3d Cir. 1980); *United States* v. *Ford*, 632 F.2d 1354, 1377 (9th Cir. 1980); *United States* v. *Masters*, 622 F.2d

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those cases held that proof of parallel business conduct is always sufficient to resist summary judgment when a price-fixing conspiracy is alleged, and all those cases involved evidence in addition to parallel pricing.

83, 88 (4th Cir. 1980). Whether the court of appeals was correct in holding that, on the facts of this case, the district court did not act arbitrarily or irrationally in refusing to consider this evidence does not present a question of general importance requiring review by this Court. There is no reason to believe that even if the evidence had been considered, petitioners would have successfully resisted respondents' motions for summary judgment. Petitioners still failed to produce any direct evidence of a conspiracy to fix interest rates in spite of eight years of discovery. Respondents' joint lobbying efforts easily can be explained for reasons unrelated to any desire to fix interest rates.[6] Consequently, absent other strong circumstantial evidence, admission of the lobbying evidence would not provide a sufficient basis for a jury verdict against the defendants.[7] In these circum-

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[6] To the extent that an 18% annual rate was the highest rate allowed by any state legislature at the time in question and a lower figure had been proposed in Illinois (Pet. App. A-10), it would have been in the interest of Illinois banks to lobby for the 18% maximum rate even if they planned to establish independent rates at a lower level. It would be in the interest of each bank operating independently to have the legal option to charge 18% rather than being restricted to a lower maximum rate.

[7] In our view, evidence of joint lobbying activities should be admitted, with a proper limiting instruction, when it is offered to corroborate other evidence of a prior agreement to fix prices. Under those circumstances, there is little danger that the jury would base its decision solely on the evidence of joint lobbying, and admission of such evidence would not chill the legitimate exercise of First Amendment rights. Since petitioners in this case sought to use the evidence in question to corroborate what they alleged was other evidence of an agreement to fix interest rates, we believe that the district court

stances, the district court's failure to consider this evidence did not prejudice petitioners.

Both petitioners and the dissenting judge on the court of appeals suggest (Pet. 15; Pet. App. A-44) that evidence may be excluded under Fed. R. Evid. 403 only if it "tends to horrify, evoke sympathy or increase a desire to punish due to prior bad acts." Their argument is conclusively refuted by the plain language of Rule 403, which provides (emphasis added):

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, *confusion of the issues, or misleading the jury*, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Obviously, evidence that does not tend to "horrify, evoke sympathy or increase a desire to punish due to prior bad acts" may nevertheless create a serious danger of "confusion of the issues * * * or misleading the jury."

Petitioners maintain (Pet. 16-17, 19) that the district court erred in applying Rule 403 in ruling upon a motion for summary judgment. In their view, the decision to admit or exclude under that rule "must be made in light of the precise trial context when it is offered" (Pet. 19). We disagree. Fed. R. Civ. P. 56(e) provides that affidavits supporting or

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could have considered the evidence. Nevertheless, since both the district court and the court of appeals concluded that petitioners' other evidence was not sufficient to prove an agreement to fix interest rates and since, as noted above, the evidence concerning joint lobbying adds little to petitioners' case, there is no reason for this Court to consider the issue in this case.

opposing summary judgment "shall set forth such facts as would be admissible in evidence." "[T]he policy of Rule 56(e) is to allow the affidavit to contain all evidentiary matter, which, if the affiant were in court and testifying on the witness stand, would be admissible as part of his testimony." 6 *Moore's Federal Practice* ¶ 56.22[1], at 1321-1322 (1980) (footnote omitted). "[T]he threshold issue of admissibility must be resolved before determining whether or not unresolved questions of fact exist." *United States* v. *Hangar One, Inc.*, 563 F.2d 1155, 1157 (5th Cir. 1977). Thus, if it is clear to the trial court even before trial that certain evidence should be excluded under Rule 403, the court should not consider that evidence in deciding a motion for summary judgment. Requiring the court to take that evidence into account at the summary judgment stage even though its exclusion at trial is foreordained would result in pointless trials in those cases in which the evidence in question is essential to one of the parties. It is true, of course, that the ruling contemplated by Rule 403 is sometimes influenced by unanticipated events at trial. Thus, in applying Rule 403 in a pretrial context, the trial court should take into consideration the possibility that events at trial might fortify the case for admitting the evidence. That possibility should also be considered by appellate courts in reviewing the district court's decision. In the present case, however, even when the possibility of unforeseen events at trial is taken into consideration, it is still clear that the district court's ruling was not arbitrary or irrational.

3. Petitioners next assert (Pet. 20-22) that the court of appeals applied an erroneous rule concerning the probative value of circumstantial evidence. The

rule in question was stated as follows in *Pevely Dairy Co.* v. *United States*, 178 F.2d 363, 367 (8th Cir. 1949) (emphasis added):

> Where circumstantial evidence is relied upon to establish the conspiracy or any other essential facts, it is not only necessary that all the circumstances concur to show the existence of such conspiracy and facts sought to be proved, *but such circumstantial evidence must be inconsistent with any other rational conclusion.*

As petitioners correctly note (Pet. 20-21), in *Holland* v. *United States*, 348 U.S. 121, 139-140 (1954), this Court disapproved as "confusing and incorrect" a jury instruction cast in similar terms. The Court stated (*id.* at 140) that "[c]ircumstantial evidence in this respect is intrinsically no different from testimonial evidence."

In the present case, the court of appeals quoted (Pet. App. A-15) the rule articulated in *Pevely Dairy Co.*, but apparently applied the following rule (Pet. App. A-15; emphasis added):

> [W]hen the plaintiff or prosecution relies on circumstantial evidence alone, the inference of unlawful agreement rather than individual business judgment must be the *compelling, if not exclusive, rational inference.*

However, assuming that the court below did not correctly describe the probative value of circumstantial evidence in a case such as this, we submit that its decision is nevertheless sound. Its opinion makes it clear that summary judgment was not awarded because petitioners failed to prove that an unlawful conspiracy was the exclusive rational inference that could be drawn from their circumstan-

tial evidence. Rather, the court repeatedly stated its conclusion that petitioners' evidence was simply inadequate to support a jury verdict in their favor (Pet. App. A-12, A-19, A-22).

4. Petitioners contend (Pet. 23-26) that the court of appeals failed to consider some of the evidence they adduced in opposition to respondents' summary judgment motions, but their argument is based upon a misreading of the court's opinion.

Petitioners state (Pet. 25):

> [I]t is clear that the majority considered plaintiffs' opposition evidence to consist solely of parallel interest rates, "together with evidence that the opportunity to conspire existed . . . ." 641 F.2d at 463 (App. A-12 [*sic*]).

What the court actually wrote was (Pet. App. A-14; emphasis added):

> *It is suggested* that while parallel pricing alone is not sufficient to establish a price-fixing conspiracy, such evidence together with an opportunity to conspire is sufficient to rebut defendants' denials and require a trial on the merits.

Thus, the court was merely rejecting an argument made on petitioners' behalf rather than listing all the evidence it had taken into consideration.

Petitioners contend (Pet. 25) that the court failed to consider evidence of respondents' "artificial product standardization and economic motive to conspire." However, the court's opinion discussed at some length petitioners' evidence of motive (Pet. App. A-20 to A-21) and referred to the affidavit of petitioners' economic expert (*id.* at A-9, A-10), which stated that respondents' product standardization exceeded that

required to make a compatible charge card system function (Pet. App. A-45 to A-46). Moreover, respondents' argument concerning product standardization was noted in the portion of the district court opinion to which the court of appeals referred in lieu of including a more detailed statement of facts in its own opinion (see Pet. App. A-5 to A-6, A-8).

5. Finally, petitioners maintain (Pet. 26-29) that the court of appeals violated the rule granting the party opposing summary judgment the benefit of all reasonable inferences arising from the evidence. To illustrate their point, petitioners cite (Pet. 27) a single example: the court's interpretation of a statement in a bank memorandum written at about the time discussions began concerning the formation of Midwest. The memorandum stated that "[Valley National Bank of Phoenix, Arizona] believe[s] that if anyone goes in Chicago, others will and this may result in chaos in the market" (Pet. App. B-9). Petitioners argue (Pet. 27) that the phrase "chaos in the market" can reasonably be interpreted to mean competition in interest rates and that the court of appeals erred in construing that phrase to mean "a retail market in which a vast number of charge cards existed" (Pet. App. A-21).

We find the court of appeals' reading much less strained than petitioners'. In addition, while the court of appeals' interpretation is supported by another internal bank memorandum written during the same period (see Pet. App. A-21 n.33), petitioners have pointed to no additional evidence supporting their construction. In any event, even if it is assumed that the statement in question gave rise to an inference in petitioners' favor, the strength of that inference would not be sufficient to alter the decision below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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